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No. 90-

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

PACIFIC LIGHTING CORPORATION,
FREDRICKS DEVELOPMENT CORPORATION, and
DUNN PROPERTIES CORPORATION,

Petitioners,

v.

MGW, INC.

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT

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QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment is violated by state laws that permit limitless jury discretion to impose financial punishments in the absence of explicit statutory or common law standards and limits establishing in advance the conduct that may be punished and the amount of punishment that may be inflicted for engaging in such conduct, and, if so, whether the $2,000,000 punitive damage award imposed in this case violates that Clause.

STATEMENT OF INTERESTED PARTIES

In addition to the parties named in the caption, defendants Pacific Lighting Real Estate Group, formerly "Pacific Real Estate Projects, Inc." ("PREP"), Home Capital Corporation and Humboldt Financial Services Corporation were parties in the court below. Pursuant to Rule 29.1 of the Rules of this Court, the following constitutes a list of all parent companies and non-wholly owned subsidiaries of petitioners:

Pacific Enterprises Corporation ("Pacific Enterprises"), formerly "Pacific Lighting Corporation," was the parent corporation of Fredricks Development Corporation ("Fredricks"), Dunn Properties Corporation ("Dunn"), and PREP, until 1987, when Fredricks, Dunn, and another Pacific Lighting Corporation subsidiary (The Presley Companies) were sold and reorganized.

Pacific Enterprises presently owns 93.29% of Southern California Gas Company, which in turn owns 4% of the Coalition Undertaking Remedial Efforts, Inc. Pacific Enterprises also owns 100% of The Thrifty Corporation, which owns 62.5% of FTM Sports Corporation ("FTM"). FTM owns 40% of Cactus Golf, Inc. and 80% of American Diversified Sports, Inc. The Thrifty Corporation also owns 100% of Gart Brothers Sporting Company, which owns 89% of Sports Castle Travels, Inc.

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Petitioners,

v.

MGW, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT

Pacific Lighting Corporation ("Pacific Lighting"), Fredricks Development Corporation ("Fredricks"), and Dunn Properties Corporation ("Dunn") respectfully petition for a writ of certiorari to review the judgment of the California Court of Appeal, Fourth Appellate District. That court affirmed a jury verdict of $2,000,000 in punitive and $558,000 in compensatory damages, plus interest, against petitioners for alleged tortious conduct in connection with an alleged oral contract. The court below expressly rejected federal constitutional objections to the punitive damage award.

OPINIONS AND ORDERS BELOW

The April 30, 1990 opinion of the California Court of Appeal was ordered by that court not to be published, *see* note 11, *infra*, and accompanying text, and is reproduced in App. A, *infra*, 1a-14a. That court's May 29, 1990 order denying rehearing is unreported and reproduced in App. B, *infra*, 15a. The July 18, 1990 order of the Supreme Court of California denying discretionary review of this case is unreported and reproduced in App. C, *infra*, 16a.

JURISDICTION

In its April 30, 1990 opinion, the California Court of Appeal expressly rejected the federal due process question presented in the Petition. On July 18, 1990, the Supreme Court of California declined to review this case, and this Petition is being filed within ninety days of that date. This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment provides, in pertinent part:

> "[N]or shall any State deprive any person of . . . property, without due process of law . . . ."

STATEMENT OF THE CASE

A. Statement of Facts

This case involves a $2,000,000 punitive damage award imposed by a jury against Pacific Lighting and its two former subsidiaries, Fredricks, a developer of

residential real estate, and Dunn, a developer of commercial real estate, for "tortious interference with prospective economic advantage" and tortious conspiracy. Respondent MGW, a commercial real estate brokerage and investment company, alleged that Mr. Malcolm Waitt, Jr., the owner and sole employee of MGW, entered into an oral broker's agreement with Fredricks under which Fredricks "would see [that Waitt] was fairly compensated" if Mr. Waitt brought a real estate opportunity to Fredricks for which a broker's fee was not paid by the seller. App. A, *infra*, 2a.

In February 1983, Mr. Waitt brought a newspaper article to Fredricks' attention that discussed an impending sale of interests in a real estate development project known as Rancho Carmel. Fredricks informed Mr. Waitt that neither it nor its parent company, Pacific Lighting, were aware of the opportunity. App. A, *infra*, 3a. Fredricks and Dunn ultimately entered into a joint venture in the Rancho Carmel development with two other companies. The joint venture interest was purchased on their behalf by Pacific Real Estate Projects, Inc. ("PREP"), another Pacific Lighting subsidiary in the business of land development.

Fredricks refused to pay Mr. Waitt a broker's fee, asserting that, unbeknownst to Fredricks, its sister corporation and partner in the joint venture, Dunn, had learned of the opportunity before Mr. Waitt brought it to Fredricks, *see* App. A, *infra*, 4a, and thus Fredricks was not obligated to pay a broker's fee under the terms of the oral agreement.

Based upon Fredricks' refusal to pay Mr. Waitt a broker's fee, MGW brought suit against Pacific Light-

ing, Fredricks, Dunn, and PREP alleging, *inter alia*, breach of an oral contract, "tortious breach of the covenant of good faith and fair dealing, conspiracy and tortious interference with prospective economic advantage."[1] App. A, *infra*, 4a. The trial court dismissed all of MGW's contract-related claims because the oral contract violated the statute of frauds. However, the jury returned a verdict of $558,000 in compensatory damages and $2,000,000 in punitive damages on the remaining claims.[2]

The trial court granted Pacific Lighting's motion for judgment notwithstanding the verdict and its motion for a new trial on state law grounds. *See* App. A, *infra*, 5a. MGW appealed that ruling, and Fredricks, Dunn and PREP appealed the trial court's judgment against them.

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[1] MGW claimed that Pacific Lighting and Dunn "interfered" with the oral agreement between Fredricks and MGW by telling Fredricks that they had already known about the Rancho Carmel opportunity, and that Fredricks conspired with them when it refused to pay the commission.

[2] App. A, *infra*, 4a. The jury apportioned the $2,000,000 punitive damage award as follows: Pacific Lighting, $800,000; Dunn, $800,000; and Fredricks, $400,000. Under California law, all of the petitioners, as well as PREP, are jointly and severally liable for the compensatory damage award. The compensatory damage award was paid in full on September 21, 1990.

The trial court granted a nonsuit in favor of PREP on the tortious interference claim; the jury found PREP liable for conspiracy, but did not assess punitive damages against PREP. The trial court also granted a nonsuit on all claims in favor of defendants Home Capital Corporation and Humboldt Financial Services Corporation, the other two participants in the Rancho Carmel project. App. A, *infra*, 4a-5a.

B. Presentation and Decision of the Federal Question

In the Court of Appeal, Pacific Lighting argued, *inter alia*, that the imposition of punitive damages in this case violated the Due Process Clause of the Fourteenth Amendment because California law permits "uncontrolled" juries to impose "unlimited punishments in which the amount imposed is calculated on an *ad hoc* basis in each case." App. D, *infra*, 20a. It also contended that the "unspecified, nebulous, and ultimately meaningless" standards governing punitive damages "only serve[ ] to multiply a defendant's uncertainty as to the punishment," resulting in "capricious awards" and "nullif[ying] the very concepts of fair play and justice embodied in the Due Process Clause . . . ." App. D, *infra*, 20a-21a.

On April 30, 1990, in an opinion ordered not to be published pursuant to Rule 977 of the California Rules of Court, the Court of Appeal reversed the grant of a new trial and judgment notwithstanding the verdict in favor of Pacific Lighting, reinstated the punitive damage judgment against Pacific Lighting, and affirmed the trial court's judgment in all other respects. App. A, *infra*, 14a. The Court of Appeal expressly rejected Pacific Lighting's federal constitutional challenges to the punitive damage award.[3] Although the

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[3] "There can be no question as to the proper presentation of a federal claim when [the court below] passes on it." *Raley* v. *Ohio*, 360 U.S. 423, 436 (1959). *Accord New Jersey* v. *Portash*, 440 U.S. 450, 455 (1979); *Jenkins* v. *Georgia*, 418 U.S. 153, 157 (1974). Although petitioners Dunn and Fredricks did not raise a federal due process challenge to the punitive damage award in the Court of Appeal, Pacific Lighting's challenge necessarily placed the entire punitive damage award in constitutional jeopardy. Furthermore, as indicated by the Court of Appeal's opinion

court below took note of this Court's grant of certiorari in *Pacific Mutual Life Insurance Co.* v. *Haslip, stay granted*, 110 S. Ct. 710 (1990), *cert. granted*, 110 S. Ct. 1780 (1990) (argued Oct. 3, 1990), it stated simply that "punitive damages are constitutional under . . . the due process provisions of the Fourteenth Amendment," App. A, *infra*, 12a, relying upon two California cases, *Bertero* v. *National General Corp.*, 13 Cal. 3d 43, 66 n.13, 529 P.2d 608, 118 Cal. Rptr. 184 (1974), and *Zhadan* v. *Downtown L.A. Motors*, 66 Cal. App. 3d 481, 501-02, 136 Cal. Rptr. 132 (1976). Both *Bertero* and *Zhadan* concluded that California's punitive damage statute sufficiently defined the proscribed conduct and the potential punishment for purposes of due process.[4]

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in this case, *see* App. A, *infra*, 12a, the Supreme Court of California unequivocally has rejected both federal and state due process attacks on that State's vague and open-ended punitive damage system. Under these circumstances, it was not necessary for Dunn and Fredricks to raise such issues in the trial court or Court of Appeal as a matter of state law. *See, e.g., Moradi-Shalal* v. *Fireman's Fund Insurance Companies*, 46 Cal. 3d 287, 292, 758 P.2d 58, 250 Cal. Rptr. 116 (1988) (defendant was not required to raise issue in the lower courts because "clearly it would have been pointless for defendant to urge either the trial or appellate court to overrule one of our decisions").

[4] In *Bertero*, the Supreme Court of California rejected an attack on *Cal. Civ. Code* § 3294 as "unconstitutionally vague because it fails to provide sufficient guidance for the trial courts charged with implementing it." 13 Cal. 3d, at 66 n.13. The court noted that the statute "merely codifies" the common law "principles" for determining whether punitive damages may be imposed and "how the amount shall be determined," *id.*, and concluded that therefore the statute was not subject to a due process challenge on vagueness grounds. The court also observed that § 3294 previously had been upheld against constitutional

Petitioners sought review of the Court of Appeal's judgment in the Supreme Court of California, contending, *inter alia*, that the Due Process Clause prohibits the "essentially unrestrained discretion" of juries to impose punitive damages in unlimited amounts. Petitioners argued that this case "raises the same federal constitutional objections to punitive damage awards" as are before this Court in *Pacific Mutual* and urged the Supreme Court of California to grant review or, alternatively, to hold the case without briefing until this Court decided *Pacific Mutual*. The Supreme Court of California, without opinion, denied review on July 18, 1990. *See* App. C, *infra*, 16a.[5]

REASONS FOR GRANTING THE WRIT

On four occasions in the past five years this Court has accepted for review cases that involved the question whether the "lack of sufficient standards governing punitive damage awards . . . violates the Due Process Clause of the Fourteenth Amendment." *Aetna Life Insurance Co.* v. *Lavoie*, 475 U.S. 813, 828-29 (1986); *see also Pacific Mutual Life Insurance Co.* v. *Haslip, cert. granted*, 110 S. Ct. 1780 (1990); *Browning-Ferris Industries of Vermont, Inc.* v. *Kelco Dis-*

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challenge "on several occasions." *Id.* The Court of Appeal in *Zhadan*, relying upon *Bertero*, also rejected the argument that *Cal. Civ. Code* § 3294 violates due process principles "because of its lack of a 'precise standard by which to fix the quantum of property . . . to be deprived . . . .' " 66 Cal. App. 3d, at 501.

[5] On August 30, 1990, Justice Kennedy granted petitioners' application for a stay of the punitive damage portion of the judgment (A-156). On September 21, 1990, Justice Kennedy denied respondent's motion to vacate the stay.

posal, Inc., 109 S. Ct. 2909 (1989); *Bankers Life and Casualty Co.* v. *Crenshaw*, 486 U.S. 71 (1988). Petitioners' Due Process Clause objections to punitive damages are indisputably substantial and worthy of review by this Court.[6]

As exemplified by this case, the California system of state-imposed punitive fines is particularly inconsistent with due process. By express statute, California assesses punitive damages only in cases "*not* arising from contract." *Cal. Civ. Code* § 3294(a) (Deering Supp. 1990) (emphasis added). Yet in this case, a California appellate tribunal, in an opinion that by law may not "be cited or relied upon . . . in any other action or proceeding," *California Rules of Court, Rule* 977,

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[6] Similar issues are before the Court in *Pacific Mutual*, as well as a number of other cases. *See, e.g., Eichenseer* v. *Reserve Life Ins. Co.*, 881 F.2d 1355 (5th Cir. 1989) ($500,000 punitive damage award), *stay granted*, 110 S. Ct. 1468 (1990), *cert. pending* (No. 89-1303); *George* v. *International Society for Krishna Consciousness of California*, 213 Cal. App. 3d 729, 262 Cal. Rptr. 217 (1989) (subsequently ordered to be depublished) ($2,500,000 punitive damage award), *stay granted*, 110 S. Ct. 1804 (1990), *cert. pending* (No. 89-1399); *Wollersheim* v. *Church of Scientology*, 212 Cal. App. 3d 872, 260 Cal. Rptr. 331 (1989) ($2,000,000 punitive damage award), *cert. pending* (No. 89-1361); *Hospital Authority of Gwinnett County* v. *Jones*, 386 S.E.2d 120 (Ga. 1989) ($1,300,000 punitive damage award), *cert. pending* (No. 89-1315); *General American Life Insurance Company* v. *Simmons*, 562 So. 2d 140 (Ala. 1989) ($600,000 punitive damage award), *stay granted*, June 4, 1990 (A-845) (Kennedy, Circuit Justice), *cert. pending* (No. 90-73); *Massachusetts Mutual Life Insurance Co.* v. *Collins*, No. 88-949 (Ala. 1990) ($750,000 punitive damage award), *cert. pending* (No. 90-244); *Buckley* v. *Ellis*, 790 P.2d 875 (Colo. Ct. App. 1989) ($125,000 punitive damage award), *cert. pending* (No. 90-191).

reinstated the portion of the jury's punitive damage verdict that had been overturned by the trial court, and affirmed the jury's original $2,000,000 punishment for failure to pay a commission "pursuant to an oral broker's agreement," App. A, *infra*, 2a, an alleged contract that is explicitly made unenforceable by California's statute of frauds. App. A, *infra*, 4a, 13a. The Court of Appeal did not engage in any apparent analysis of the amount of the award.

The California courts have repeatedly rejected federal (and state) constitutional challenges to this increasingly erratic system. Only this Court can resolve the due process question presented in the Petition.

A. The Court Should Grant Review to Decide the Extent to Which the Due Process Clause of the Fourteenth Amendment Limits the Otherwise Unfettered Discretion of Juries to Inflict Punitive Damages in Civil Actions Involving Private Parties

In California, as in most jurisdictions, the law of punitive damages allows punishment for deviation from vague, elastic and evolving "standards" of conduct and affords substantially unfettered discretion to juries to render a punishment in virtually any amount. Indeed, California Civil Code § 3294, which purports to define the circumstances and manner in which punitive damages may be imposed, articulates neither limits nor objective factors for determining the level of punishment necessary to achieve the State's goals of retribution and deterrence in a particular case. *See Cal. Civ. Code* § 3294 (Deering Supp. 1990).

Nor does the common law provide any meaningful guidance. The California Court of Appeal has determined that no limits or formulae exist for calculating

punitive damages and that that is precisely the way it should be in California:

> The channeling of just the correct quantum of bile to reach the correct level of punitive damages is, to put it mildly, an unscientific process complicated by personality differences. Conduct which one person may view as outrageous another may accept without feeling, depending on such diverse characteristics as an individual's background, temperament and societal concerns. *The process is further complicated by the lack of objective criteria from either the Legislature or the courts as to "how much" is necessary to punish and deter.*
>
> We have examined a number of appellate decisions in an effort to determine whether we could discern from the cases a single formula for calculating punitive damages . . . . Frankly, we are unable to find that formula. Instead of making a mathematical breakthrough we discovered what everyone probably already knows: *the formula does not exist. And, we have concluded, that is properly so.*

Devlin v. *Kearny Mesa AMC/Jeep/Renault, Inc.*, 155 Cal. App. 3d 381, 388, 202 Cal. Rptr. 204 (1984) (emphasis added) (footnote omitted); *see also Gagnon* v. *Continental Casualty Co.*, 211 Cal. App. 3d 1598, 1604-05, 260 Cal. Rptr. 305 (1989) ("In the final analysis . . . the propriety and amount of punitive damages depends entirely upon the particular facts of a case.").

Appellate review of punitive verdicts in California is both standardless and highly deferential. The Court of Appeal has explained:

> The calculation of punitive damages involves, . . . "a fluid process of adding or subtracting depending on the nature of the acts and the effect on the parties and the worth of the defendants," and in this regard juries have a wide discretion in determining what is proper . . . . "The purpose of punitive damages is to punish wrongdoers and thereby deter the commission of wrongful acts . . . . " The more reprehensible the act, the greater the appropriate punishment.

Downey Savings & Loan Ass'n v. *The Ohio Casualty Insurance Co.*, 189 Cal. App. 3d 1072, 234 Cal. Rptr. 835 (1987), *cert. denied*, 486 U.S. 1036 (1988) (citations omitted). Thus, on appeal, "[a]ll presumptions favor the correctness of the verdict and judgment," *Devlin*, 155 Cal. App. 3d, at 388, and a punitive damage award will not be disturbed unless "the entire record viewed most favorably to the judgment indicates the award was rendered as a result of passion and prejudice." *Walker* v. *Signal Companies Inc.*, 84 Cal. App. 3d 982, 997, 149 Cal. Rptr. 119 (1978).

The impact of this wholly unlimited and "fluid process" of punishment is, as this Court has recognized, manifestly "unpredictable and potentially substantial." *Electrical Workers* v. *Foust*, 442 U.S. 42, 50 (1979); *see also Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) ("juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused"); *City of Newport*

v. *Fact Concerts, Inc.*, 453 U.S. 247, 270-71 (1981) ("the impact of such a windfall recovery is likely to be both unpredictable and, at times, substantial"); *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 82-83, 84 (1971) (Marshall, J., dissenting) ("the essence of [unlimited] discretion is unpredictability and uncertainty" and it "allows juries to penalize heavily the unorthodox and the unpopular and exact little from others").

California juries have imposed punitive damages in radically varying amounts for the same kind of conduct—tortious interference with commerical relationships—involved in this case. *See, e.g., Shamblin* v. *Berge*, 166 Cal. App. 3d 118, 212 Cal. Rptr. 313 (1985) (affirming $2,500 punitive damage award against real estate agents for tortious interference with a contractual relationship of real estate developer); *Shapoff* v. *Scull*, 222 Cal. App. 3d 1457, 272 Cal. Rptr. 480 (1990) (affirming a $300,000 punitive damage award against three defendants for intentional interference with contractual relations in connection with real estate development transaction); *Ramona Manor Convalescent Hospital* v. *Care Enterprises*, 177 Cal. App. 3d 1120, 225 Cal. Rptr. 120 (1986) (reversing $2,500,000 punitive damage award for tortious interference in connection with real estate lease dispute because, *inter alia*, the award was "unsupported by the verdict"); *Greenwood & Co. Real Estate* v. *C-D Investment Co.*, Nos. C 523-923, C 560-824 (Super. Ct., Los Angeles Co., Cal. Mar. 5, 1990) ($30,000,000 punitive damage verdict for tortious interference and tortious conspiracy in connection with breach of an oral real estate broker's agreement) (notice of appeal filed).[7]

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[7] In cases involving the related contract-based tort of "breach

The punitive damage systems of other jurisdictions likewise produce random and wholly unpredictable verdicts. For example, in *Eichenseer* v. *Reserve Life Insurance Co.*, 881 F.2d 1355 (5th Cir. 1989), *stay granted*, 110 S. Ct. 1468 (1990), *cert. pending* (89-1303), Judge Jones "review[ed] the range of punitive damages that have been awarded under Mississippi's bad faith refusal [to pay an insurance claim] law," 894 F.2d 1414, 1420-21 (5th Cir. 1990) (dissenting from denial of rehearing *en banc*), and found "a nearly hundred fold variation in the range of punishments assessed." *Id.* Judge Jones concluded that this "punishment without moorings," *id.*, at 1421, "mocks our notions of fundamental fairness embodied in the Due Process Clause . . . . " *Id.*, at 1415. *See also General American Life Insurance Co.* v. *Simmons*, 562 So. 2d 140, 151 (Ala. 1989) (Houston, J., concurring) (criticizing the procedural defects of the Alabama punitive damage system because "for the same conduct, within a five-year period, under the same jury instruction, one jury punishes one insurance company and its special agent in the amount of $21,130.86, and another jury punishes another insurance company and its special agent in the amount of $2,490,000"), *cert. pending* (No. 90-73).

The Petition should be granted so that this Court can finally resolve the question whether a system that imposes completely unpredictable punishments rang-

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of the convenant of good faith and fair dealing," the California appellate courts have affirmed awards ranging from $150,000, *Miller* v. *Elite Ins. Co.*, 100 Cal. App. 3d 739, 161 Cal. Rptr. 322 (1980), to $15,000,000. *See Eaton Corp.* v. *PKL Cos.*, *cert. denied*, 109 S. Ct. 1933 (1989) (Court of Appeal's opinion unpublished).

ing up to tens of millions of dollars for deviation from undefined or vaguely defined standards comports with the Due Process Clause. Indeed, this Court should consider why due process is not violated by the imposition of any punitive damages in the absence of an established "range of penalties as to which responsible officials had deliberated and then agreed." *Browning-Ferris Industries of Vermont, Inc.* v. *Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2923 (1989) (Brennan, J., concurring). No "responsible officials" established a range of penalties in this case. Moreover, as Justice Brennan, joined by Justice Marshall, noted in *Browning-Ferris*, "even where a statute sets a range of possible civil damages . . . the Due Process Clause forbids damages awards that are 'grossly excessive.'" *Id., quoting Waters-Pierce Oil Co.* v. *Texas*, 212 U.S. 86, 111 (1909). The award in this case is clearly unconstitutional under the standard articulated by Justice Brennan.

A criminal fine imposed by a jury against petitioners in the absence of any statutory limits would surely be forbidden by the Due Process Clause. *See United States* v. *Batchelder*, 442 U.S. 114, 123 (1979) ("vague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute"). In administering punishment in criminal cases, there is simply no credible argument against the principle that the law must "fairly and clearly define . . . the punishment which can be administered." *Berra* v. *United States*, 351 U.S. 131, 139 (1956) (Black, J., dissenting). Vague penal laws not only fail to provide "fair warning," but also "impermissibly delegate[ ] basic policy matters to . . . judges . . . and juries for

resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned* v. *City of Rockford*, 408 U.S. 104, 108-09 (1972).

In California, the vagueness of the standards for imposing punitive damages is compounded by the secret system of review practiced by that State in which appellate courts revise, reinstate, modify or affirm punitive damage awards in staggering amounts in "unpublished" or "depublished" opinions.[8]

These same due process principles would prohibit the imposition of a limitless civil fine payable to the State.[9] Indeed, it seems inconceivable that this Court would uphold a statute enforced by a State that expressly left with a jury or a judge the right, after determining liability based upon an elastic standard such as "despicable conduct,"[10] or some other wholly subjective yardstick, to impose a fine solely in their discretion. *See Giaccio* v. *Pennsylvania*, 382 U.S. 399 (1966). As this Court stated in *United States* v. *Halper*, 109 S. Ct. 1892 (1989), in applying the Double Jeopardy Clause to the punitive component of an ostensibly "civil" fine, "a civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment." *Id.*, at 1901-02. *See Browning-Ferris*, 109 S. Ct., at 2920 n.21. Under *Halper*, punishment is constitutionally distinct from damages constituting compensation and necessarily implicates due process

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[8] *See infra* note 11 and accompanying text.

[9] Moreover, the excessiveness of any such fine seemingly would be subject to scrutiny under the Eighth Amendment. *See Browning-Ferris*, 109 S. Ct., at 2914, 2916, 2918 & 2920.

[10] *See Cal. Civ. Code* § 3294(c).

concerns quite discrete from those invoked by purely compensatory damages.

In fact, punitive "damages" is a misnomer. Such awards are state-imposed punishments that serve no compensatory function but, rather, seek to fulfill the State's retributive and deterrent objectives. *See, e.g., Dyna-Med, Inc.* v. *Fair Employment & Housing Commission*, 43 Cal. 3d 1379, 1387, 743 P.2d 1323, 241 Cal. Rptr. 67 (1987) ("Punitive damages . . . are neither equitable nor corrective; punitive damages serve but one purpose—to punish and through punishment, to deter."). Punitive damages are therefore generically in the class of criminal punishments and civil fines—society's remedies for public wrongs—and not at all within the genus "damages."

As stated by Justice O'Connor, the "grant [to a jury] of wholly standardless discretion to determine the severity of punishment appears inconsistent with due process." *Bankers Life*, 486 U.S., at 88 (O'Connor, J., concurring in part and concurring in the judgment). "The touchstone of due process is protection of the individual against arbitrary action of government," *Daniels* v. *Williams*, 474 U.S. 327, 331 (1986), *quoting Dent* v. *West Virginia*, 129 U.S. 114, 123 (1889), and it demands that juries be confined in their ability to administer punishment by the deliberative judgments of legislatures regarding: (1) the amount of punishment necessary to secure society's interests in retribution and deterrence; and (2) the standards under which the jury is to arrive at an appropriate punishment in a particular case. This question is important, implicates a broad spectrum of civil litigation in which punitive damages are available, and should be decided in this case.

B. Only this Court Can Resolve the Question Presented in the Petition

The fundamental due process defects in the punitive damage system discussed above can only be cured by a decision of this Court. The Supreme Court of California has turned a deaf ear to repeated constitutional objections to that system, as have the California lower courts. *See, e.g., Farajpour* v. *University of Southern California*, 221 Cal. App. 3d 19, 39-40, 270 Cal. Rptr. 356 (1990) (citing decisions of "the California Supreme Court . . . summarily rejecting constitutional challenges" to punitive damages and concluding that such challenges "cannot properly be addressed to any court subordinate to the California Supreme Court") (subsequently ordered to be depublished).

As noted above, such is the antipathy of the California courts towards these important constitutional issues that they routinely affirm seven- and eight-digit punitive damage awards in "unpublished" opinions that simultaneously perpetuate and shield from scrutiny the capriciousness of the punitive damage system. For example, after noting that the due process question had been left open in *Browning-Ferris*, on August 30, 1989, a California Court of Appeal rejected a federal due process challenge to a $2,500,000 punitive damage award, stating that although the "thrust of defendants' contentions is not without some persuasive force," "we think it appropriate to rely on *Downey Savings* [*and Loan Association* v. *The Ohio Casualty Insurance Co.*, 189 Cal. App. 3d 1072, 234 Cal. Rptr. 835 (1987), *cert. denied*, 486 U.S. 1036 (1988)] pending further action by the United States

or California Supreme Courts."[11] The California legislature also has declined to intervene, making only minor adjustments to California's law of punitive damages since this Court's 1986 decision in *Aetna*.[12]

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[11] *George* v. *International Society for Krishna Consciousness of California*, 213 Cal. App. 3d 729, 798, 262 Cal. Rptr. 217 (1989) (subsequently ordered to be depublished), *stay granted*, 110 S. Ct. 1804 (1990), *cert. pending* (No. 89-1399); *see also Eaton Corp.* v. *The PKL Cos.*, *cert. denied*, 109 S. Ct. 1933 (1989) ($15,000,000 punitive damage award affirmed in an unpublished opinion); *Metromedia, Inc.* v. *April Enterprises, Inc.*, *cert. denied*, 109 S. Ct. 3242 (1989) ($14,000,000 punitive damage award affirmed in an unpublished opinion); *Security Pacific National Bank* v. *Williams*, 213 Cal. App. 3d 927, 262 Cal. Rptr. 260 (1989) (affirming $2,500,000 punitive damage award) (subsequently ordered not to be published); *Leonardini* v. *Shell Oil Co.*, 216 Cal. App. 3d 547, 264 Cal. Rptr. 883 (1989) (affirming $5,000,000 punitive damage award) (punitive damage portion of opinion ordered to be depublished), *cert. denied*, October 15, 1990 (No. 89-2029); *The Ohio Casualty Insurance Co.* v. *G. Amador Corp.*, *cert. dism'd* (No. 89-1986) (affirming $10,000,000 punitive damage award in an unpublished opinion). Because such decisions are "unpublished," it is entirely possible that there are other similar awards affirmed by the California Court of Appeal that are inaccessible to the public and the bar because of California's peculiar official censorship policy. As illustrated by cases like *George* v. *International Society for Krishna Consciousness*, this censorship policy is sometimes enforced by the Supreme Court of California by overriding a Court of Appeal decision ordering its opinion to be published. Under Rule 977 of the California Rules of Court, such unpublished or depublished opinions generally may not even be cited or relied upon by litigants. This practice screens from public scrutiny the effects of the punitive damage system and aggravates the *ad hoc* and utterly unpredictable nature of punitive damages.

[12] In 1987, the California legislature enacted a comprehensive "tort reform" package, which, *inter alia*, amended in a number of respects *Cal. Civ. Code* § 3294, the statute pursuant to which punitive damages were and continue to be generally authorized in civil actions *without limit*. Prior to its amendment, § 3294 allowed punitive damages in unlimited amounts to be imposed where a preponderance of the evidence showed that the defendant had "been guilty of oppression, fraud, or malice." As amended, it now requires proof "by clear and convincing evidence." The definitions of "malice" and "oppression" also were re-

The courts of the other States continue to enter and affirm punitive damage awards as if this Court's concerns had never been articulated. As expressed by a Maryland appellate court on June 9, 1989, after citing cases such as *Day* v. *Woodworth*, 54 U.S. (13 How.) 363 (1851), for this Court's "approval" of the punitive damage system, "[w]hat the Supreme Court has declared constitutional we may not put asunder. . . ." *Potomac Electric Power Co.* v. *Smith*, 79 Md. App. 591, 558 A.2d 768, 792 (Md. Ct. Spec. App. 1989) (affirming $7,500,000 punitive damage award). In *General American Life Insurance Co.* v. *Simmons*, 562 So. 2d 140 (Ala. 1989), *stay granted*, June 4, 1990 (A-845) (Kennedy, Circuit Justice), *cert. pending* (No. 90-73), the Supreme Court of Alabama affirmed a $600,000 punitive damage award, disposing of Due Process Clause challenges to the award on the basis of its own previous decisions in which it "has consistently rejected the same arguments . . . and has upheld the constitutionality of punitive damages." Id., at 149.[13]

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vised to require that the conduct be found "despicable" in certain circumstances. More broadly, the 1987 legislation provided that evidence of a defendant's financial condition not be admitted prior to a finding of liability and a finding of "malice, oppression or fraud" warranting punitive damages, and further provided that complaints for punitive damages not state an amount. *See Cal. Civ. Code* § 3295 (Deering Supp. 1990).

[13] Similarly, on October 4, 1989, an Indiana appellate court, affirming a $1,000,000 punitive damage award for false imprisonment and malicious prosecution, observed:

> [P]unitive damages have long been recognized as comporting with the Fundamental Fairness Doctrine of the due process clause. *Missouri Pacific and R. Co.* v. *Humes* (1885), 115 U.S. 512. It is true . . . that Justice O'Connor recently commented in a recent opinion about punitive damages and due

The federal courts of appeals likewise seem to be in a state of paralysis in dealing with the constitutional implications of punitive damages. This paralysis manifests itself in two ways. First, courts of appeals cling to their own precedents, decided decades before serious federal constitutional objections to arbitrary and excessive punitive damage awards were advanced in and legitimated by this Court in *Aetna*, *Bankers Life*, and *Browning Ferris*. Thus, in *Racich* v. *Celotex Corp.*, 887 F.2d 393, 399 (2d Cir. 1989), the Second Circuit could not "write upon a clean slate" on the due process issue because a twenty-two year-old de-

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process protections. *See Bankers Life, supra.* However, the Supreme Court in that case and in a subsequent decision explicitly refused to consider the question. *See Browning-Ferris, supra.* Thus, we cannot conclude that the punitive damage award here violated the fourteenth amendment of the United States Constitution.

Lazarus Department Store v. *Sutherlin*, 544 N.E.2d 513, 529-30 (Ind. App. 1989); *see also Olson* v. *Walker*, 781 P.2d 1015, 1022-23 (Ariz. App. 1989) ("neither the U.S. Supreme Court nor any Arizona court has decided whether more stringent procedures are necessary in private civil punitive damages actions to satisfy due process .... The punitive damage award does not violate due process."); *Stoner* v. *Nash Finch, Inc.*, 446 N.W.2d 747, 755-56 (N.D. 1989) (discussing *Browning-Ferris* and rejecting due process challenges to punitive damages because "courts which have recently addressed arguments ... that various punitive damages schemes are unconstitutionally vague in defining conduct giving rise to liability and in providing standards for assessing the amount, have found no due process violation"); *Douglas* v. *Bank of New England/Old Colony, N.A.*, 566 A.2d 939, 942 (R.I. 1989) (due process challenge to punitive damages is "not persuasive in light of the fact that there is no showing that the trial justice's award ... constituted an abuse of ... the due process clause of the Federal Constitution .... *See Browning-Ferris Industries of Vermont, Inc.* v. *Kelco Disposal, Inc.* ...,") (affirming $225,000 punitive damage award).

cision of that court had considered and *implicitly* rejected an apparently similar claim.[14]

Second, no Court of Appeals appears to want to be the first to decide these substantial due process questions. As the Fifth Circuit has put it, "no circuit court has yet ruled on this issue" and "we need not become the first court to resolve this challenging inquiry." *Eichenseer* v. *Reserve Life Insurance Co.*, 881 F.2d 1355, 1365 (5th Cir. 1989) (affirming $500,000 punitive damage award), *stay granted*, 110 S. Ct. 1468 (1990), *cert. pending* (No. 89-1303); *see also Davis* v. *Merrill Lynch, Pierce, Fenner & Smith*, 906 F.2d 1206, 1226 (8th Cir. 1990) ("Assuming without deciding that punitive damages awards must comply with due process," and affirming $2,000,000 punitive damage award). The Ninth Circuit brushed off a due process challenge with the observation that, "[u]nder *current* constitutional standards, the jury's discretion regarding punitive damages is not subject to strict fetters. 'Jury discretion over the amounts awarded is limited only by the gentle rule that [punitive damages] not be excessive.' "[15] *See also The Post Office* v. *Portec, Inc.*, Nos. 88-2836, 89-1034 (10th Cir. Aug. 27, 1990), slip op., at 13 ("Defendant points to no Supreme Court action that requires us to question our prior holding" that the "Colorado [punitive damage] statute did not violate the due process clause[ ] of the federal . . . constitution") (remitting $1,500,000 punitive damage award to $500,000).

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[14] *Roginsky* v. *Richardson-Merrell, Inc.*, 378 F.2d 832, 835, 841-42 (2d Cir. 1967).

[15] *Kraus* v. *Santa Fe Southern Pacific Corp.*, 878 F.2d 1193, 1200 (9th Cir. 1989) (emphasis added) (quoting *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)), *cert. dism'd*, 110 S. Ct. 1329 (1990).

The federal district courts are in comparable disarray. On February 1, 1990, a federal district court—after full briefing of these constitutional issues in the post-trial motions—entered judgment on a $30,000,000 punitive damage award without any reference to these issues other than the statement that "[t]his court has carefully considered each post judgment motion . . . ." *Brooks* v. *Hilton Casinos, Inc.*, No. CV S-84-436 (RDF) (D. Nev. Feb. 1, 1990); *see also Advanced Medical, Inc.* v. *Arden Medical Systems, Inc.*, Civ. Action No. 87-3059 (E.D. Pa. Sept. 6, 1990), slip op., at 10 (Defendants' "contention . . . that an award of punitive damages acts as a deprivation of their property without due process of law . . . provides an interesting academic argument. It is not, however, the long line of punitive damages law which this court must follow.") (denying post-trial motions challenging jury verdict of $7,150,000 in punitive damages for "tortious interference with existing contractual relationships").

Other federal district courts have expressly found *Browning-Ferris* to be dispositive authority against applying the Due Process Clause to punitive damage awards. For example, in *Ay You Man* v. *Raymark Industries*, Nos. 87-14524, 87-14470 (D. Hawaii Nov. 16, 1989), the District Court rejected a broad due process challenge to the standardless imposition of punitive damages, stating that it did "not find that the [United States] Supreme Court has given any indication that punitive damages are unconstitutional as a matter of law and this court will not extract such a doctrine from defendants' inaccurate interpretation

of Court dicta." Slip op., at 4. Similar post-*Browning-Ferris* federal cases abound.[16]

Perhaps the Second Circuit has captured as well as possible the reluctance of the lower state and federal courts to march into this new constitutional terrain.

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[16] *See Falk* v. *McNamara*, No. 88 C 7293 (N.D. Ill. Mar. 30, 1990), slip op., at 4 (although "*Browning-Ferris* . . . declined to address the issue herein, the Supreme Court decisions in the area imply that punitive damage awards do not violate due process as a matter of law"); *Germanio* v. *The Goodyear Tire & Rubber Co.*, 732 F. Supp. 1297, 1304 (D.N.J. 1990) ("It will take a less skeptical and more adventurous court than this one to conclude that the Fourteenth Amendment requires higher standards of procedural protection for civil defendants in [punitive damage] cases than those that have obtained for decades, if not centuries."); *Gray* v. *Armstrong World Industries*, No. 88-2509 (D.D.C. Feb. 22, 1990), slip op., at 6 (noting a lack of "substantial supporting authority" for the argument that "punitive damages are per se unconstitutional" and suggesting that this Court rejected "similar constitutional challenges" in *Browning-Ferris)*; *In re Joint Eastern and Southern District Asbestos Litigation*, No. 87 Civ. 4483 (E.D. & S.D.N.Y. Oct. 24, 1989), slip op., at 2 ("Celotex's challenges to the punitive damages award are also unavailing . . . . [T]he constitutionality of punitive damages awards has recently been affirmed" in *Browning-Ferris)*; *Guarino* v. *Armstrong World Industries, Inc.*, No. 88-1087 (S.D. Fla. Oct. 13, 1989), slip op., at 4 & n.3 (rejecting due process challenges to punitive damages because, *inter alia*, "the Supreme Court has long held state regulation in the economic realm to be immune from due process invalidation, where the state has presented a valid basis for its regulation"); *Hart* v. *Armstrong Cork Co.*, No. S79-0033 (S.D. Miss. Sept. 13, 1989) (consolidated cases), slip op., at 9 ("The defendant's challenge [to Mississippi's punitive damage standards] appears particularly unpersuasive in light of the United States Supreme Court's decision in *Smith* v. *Wade*, 461 U.S. 30 (1983)."); *Juzwin* v. *Amtorg Trading Corp.*, 718 F. Supp. 1233, 1235 (D.N.J. 1989) (lower courts are "powerless to fashion a remedy" that will protect the due process rights of defendants subject to multiple punitive awards until "there is uniformity either through [United States] Supreme Court decision or national legislation"); *Leonen* v. *Johns-Manville Corp.*, 717 F. Supp. 272, 280 (D.N.J. 1989) ("the United States Supreme Court's decision in *Smith* v. *Wade* . . . puts to rest any question regarding the vagueness" of punitive damage standards).

More than three months after this Court's decision in *Browning-Ferris*, that court refused to tread into what is so obviously this Court's domain:

> [W]e are here asked to hold, in effect, that the common-law standards applied by the [state] courts . . . for imposition of punitive damages are unconstitutional . . . . Under all the circumstances, we believe that such a step, if it is to be taken . . . is best left for . . . higher judicial authority.

Racich v. *Celotex Corp.*, 887 F.2d, at 399. *Accord Simpson* v. *Pittsburgh Corning Corp.*, 901 F.2d 277 (2d Cir. 1990), *cert. dism'd* (No. 90-121).

Based upon the foregoing, petitioners respectfully submit that the need for this Court's intervention is manifest.

CONCLUSION

The California courts have firmly rejected petitioners' arguments that the United States Constitution regulates the manner in which punitive damages may be imposed. This Court's resolution of the question presented by petitioners will have a substantial impact on matters that are arising daily in the courts of this Nation and are dramatically changing the character of litigation conducted throughout the United States. Petitioners respectfully pray that the Petition be granted and that this question be set for plenary consideration.

October 16, 1990

Respectfully submitted,

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APPENDIX

APPENDIX A

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

G006654
(Super. Ct. No. 416196)

MGW, INC.,
Plaintiff and Appellant,
v.
FREDRICKS DEVELOPMENT CORPORATION et al.,
Defendants and Appellants.

COURT OF APPEAL-4TH DIST. DIV. 3
FILED
APR 30 1990
Deputy Clerk

OPINION

APPEAL from a judgment of the Superior Court of Orange County, Samuel B. Taylor, Jr., Judge. Affirmed in part and reversed in part.

Perez & McNabb and Richard L. Perez for Plaintiff and Appellant.

Irell & Manella, Scott D. Baskin, Andra Barmash Greene, Gibson, Dunn & Crutcher, John J. Swenson, Rob-

ert F. Serio, Higgs, Fletcher & Mack, Woodrow D. Smith, John M. Morris, Melvin King, Drummy, Garrett, King & Harrison, Howard F. Harrison and Kathleen Carothers Paone for Defendants and Appellants.

* * *

A jury awarded plaintiff real estate broker damages against defendant real estate developers for interference with prospective economic advantage and conspiracy after defendant developers refused to pay plaintiff a commission pursuant to an oral broker's agreement. Defendant developers appeal from the judgment, and plaintiff broker appeals from orders of dismissal and nonsuit as to other defendants. We reverse as to defendant Pacific Lighting, but affirm the judgment in all other respects.

FACTS

Plaintiff MGW is a commercial real estate brokerage and investment firm owned and operated by Malcolm Waitt, Jr., a licensed real estate broker. Waitt is MGW's only employee.

Defendant Fredricks Development Corporation is a real estate developer involved in the construction of large-scale residential tracts. Fredricks is a wholly-owned subsidiary of Pacific Lighting Corporation.

In 1982 Fredricks made known to Waitt and other local brokers that it was interested in acquiring a large residential project along the I-15 corridor in the southern Orange County or northern San Diego County area. Waitt was told that if he brought in an opportunity Fredricks undertook and was not paid a broker's fee by the seller, Fredricks would see he was fairly compensated. This was Fredricks' standard arrangement, and on at least one previous occasion Waitt was paid for his efforts under this arrangement. Waitt had no written broker's contract with Fredricks.

On or about February 14, 1983, Waitt read a newspaper article which said that Home Capital, which was in the business of financing developments, had bought out its prior partner and was looking for an experienced developer and joint venturer to help build out a 1500-acre mixed residential/commercial project known as Rancho Carmel.[1] The project was located along the I-15 corridor in northern San Diego County. Waitt, believing this was just the opportunity Fredricks was looking for, called Home Capital and told them Fredricks might be interested in the project. Home Capital told Waitt that if they struck a deal with Fredricks they would not pay a broker's fee and he would have to look to Fredricks for any commission.

Waitt showed the article to Fredricks. They told him that neither they nor Pacific Lighting were aware of the Rancho Carmel opportunity, and on being advised Home Capital would not pay a broker's commission, Fredricks assured Waitt that if they went ahead with the deal he would be fairly compensated.

On March 21, 1983, Fredricks, Home Capital, and Dunn Properties Corporation, a wholly-owned subsidiary of Pacific Lighting which builds out commercial tracts, signed a letter of intent to enter into a joint venture to build the Rancho Carmel project. The purpose of the letter was to tie up the property for a period of time in order to allow Fredricks and Dunn to determine the project's feasibility. One of its provisions was that: "[Dunn and Fredricks] and Home [Capital] each hereby represent to one another that no broker or finders fee will be payable as a result of D & F and Home entering into the proposed venture and each indemnifies the other against any such broker or finders fee." Dunn became involved because Fredricks could not handle the commercial end of the project.

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[1] Humboldt Financial Services Corporation also owned a small part of the project.

Waitt frequently asked about the project and was led to believe the deal was progressing smoothly and that Fredricks intended to compensate him. He was never told he would not be paid a commission.

The joint venture interest was ultimately purchased on behalf of Fredricks and Dunn in the name of Pacific Real Estate Projects (PREP), another wholly-owned subsidiary of Pacific Lighting. Fredricks, however, refused to pay Waitt a broker's commission, claiming the Pacific Lighting corporations knew of the opportunity before Waitt brought the newspaper clipping to them. Waitt was told that in late 1982 there had been rumors the Rancho Carmel project might soon become available, that Dunn had inquired (through a different broker) whether Home Capital would sell off just the commercial use, that Home Capital said it was unwilling to discuss sale of the project until it bought out its joint venturer, and that Home Capital was unwilling to sell off just the commercial part of the project since it viewed the entire development as an integrated plan. Dunn, however, did not pursue the commercial part of the project at any time after it became available and before Waitt brought Fredricks the article.

Waitt filed an action for breach of oral agreement, quantum meruit, tortious breach of the covenant of good faith and fair dealing, conspiracy and tortious interference with prospective economic advantage. The complaint named Fredricks, Dunn, Pacific Lighting, PREP, Home Capital and Humboldt as defendants.

At trial the court dismissed all of MGW's contractual claims on the ground they were unenforceable under the statute of frauds. A nonsuit was granted in favor of Home Capital and Humboldt, and a nonsuit was granted to PREP on the interference with prospective advantage claim. The jury returned a verdict of $558,000 in damages against Fredricks, Pacific Lighting, Dunn and PREP, and $2 million in punitives against all defendants but PREP. Pacific

Lighting's motions for judgment notwithstanding the verdict and a new trial were granted. Fredricks, Dunn and PREP appeal from the judgment. MGW appeals from the orders of nonsuit, new trial, and judgment notwithstanding the verdict.

DISCUSSION

I

Fredricks and Dunn Appeal

A

Fredricks and Dunn argue that no cause of action can be stated for interference with prospective economic advantage when the underlying agreement violates public policy. While recognizing that *Buckaloo* v. *Johnson* (1975) 14 Cal.3d 815 holds that a broker may state a cause of action for interference with prospective economic advantage even when the agreement violates the statute of frauds (*id.* at pp. 829-830), Fredricks and Dunn argue the Supreme Court has signalled a change in this rule in its recent opinion in *Phillippe* v. *Shapell Industries* (1987) 43 Cal.3d 1247. We disagree.[2]

In *Buckaloo* the court held a purchaser may not, "with full knowledge of the economic relationship between broker and seller, intentionally induce[ ] the latter to violate the terms of the relationship and seek refuge in the unenforceability of the contract." (*Buckaloo* v. *Johnson, supra,* 14 Cal.3d at p. 827.) The court explained: "There is no

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[2] The five elements for interference with prospective economic advantage are: "(1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant. [Citations.]" (*Youst* v. *Longo* (1987) 43 Cal.3d 64, 71, fn. 6.)

public policy to be served by encouraging such devious dealings; on the contrary, such an intrusion into a protected economic relationship is precisely the conduct condemned by the traditional tort of interference with contract." (*Id.* at p. 828.) In *Phillippe* the court reemphasized its commitment to the principle that a contractual claim for a real estate commission is dependent on compliance with the statute of frauds (*Phillippe* v. *Shapell Industries, supra*, 43 Cal.3d at p. 1267), and held a broker may not avoid the statute of frauds by asserting that he reasonably relied on an oral agreement. (*Id.* at p. 1270.)

Nothing in *Phillippe* suggests that *Buckaloo* has been overruled; indeed, it cites *Buckaloo* approvingly. If Fredricks and Dunn are correct and the Supreme Court wishes to repudiate *Buckaloo*, then that is a matter for its review. Meanwhile, we are constrained to follow the law as it has been laid down by the Supreme Court. (*Auto Equity Sales, Inc.* v. *Superior Court* (1962) 57 Cal.2d 450, 455.)

B

Next, Fredricks and Dunn argue the judgment must be reversed because Dunn as an agent and wholly-owned subsidiary of Pacific Lighting could not interfere with the relationship, there was no evidence Fredricks refused to pay the commission because of what Dunn told it, and there could be no conspiracy because there was no underlying tort. We disagree.

Although the arguments appear to raise issues of law, on closer review it is clear they are based on the notion that there is no substantial evidence to support the jury's finding Dunn conspired or could conspire with Fredricks. In reviewing a claim of insufficiency of the evidence we " 'must accept as true all evidence tending to establish the correctness of the finding as made, taking into account, as well, all inferences which might reasonably have been thought by the trial court to lead to the same conclusion.

Every substantial conflict in the testimony is . . . to be resolved in favor of the finding.' [Citation.]" (*County of Mariposa* v. *Yosemite West Associates* (1988) 202 Cal.App.3d 791, 807; 9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 282, p. 293.)

Fredricks and Dunn initially assert Dunn could not interfere with MGW's prospective economic relationship because it was not a malicious interloper or stranger to the disrupted relationship. Relying on selected language in *Buckaloo* v. *Johnson, supra,* 14 Cal.3d at p. 827 and *Zimmerman* v. *Bank of America* (1961) 191 Cal.App.2d 55, 61, they contend Dunn, as a wholly-owned subsidiary in the Pacific Lighting family, could not interfere with a relationship to which it was a party. The argument is subtly deceptive. Although Fredricks and Dunn are subsidiaries of Pacific Lighting, that does not mean they are "the same party" and cannot interfere with the other's economic relationships. Indeed, evidence adduced at trial was that the two subsidiaries worked independently in different parts of the development world: Fredricks was involved in the residential arena while Dunn was involved in the commercial; the two were competitors and had never, up until Rancho Carmel, worked on a project together; and Pacific Lighting does not guarantee the obligations of its subsidiaries. From this evidence the jury could reasonably conclude Fredricks and Dunn were independent entities.

In that same vein, Fredricks and Dunn contend Dunn could not interfere because it was Fredricks' agent. While the complaint alleged the defendants were agents of each other, the evidence was to the contrary. Moreover, MGW's motion to amend the complaint to conform to proof and delete the allegations of agency was properly granted. (5 Witkin, Cal. Procedure (3d ed. 1985) Pleading, § 1137, pp. 551-552.)

Next, they argue MGW disproved causation because the evidence showed Fredricks decided not to pay the com-

mission for reasons other than what Dunn said. But the jury concluded that it was precisely because of what Dunn said that the commission was not paid. There may be evidence which could be interpreted differently, but we must resolve all conflicts in the evidence in favor of the finding.

Finally, they argue that there could be no actionable conspiracy because there was no tort. (*Manor Investment Co.* v. *F. W. Woolworth Co.* (1984) 159 Cal.App.3d 586, 595.) Here, of course, there was an actionable wrong and thus there could be a conspiracy.

C

Finally, Fredricks and Dunn contend the trial court improperly instructed the jury.

They argue the court erred in failing to define who constituted an employee or agent of a party, and improperly used the term parties, rather than interloper, when describing the one who interferes. This argument cannot be sustained as no request for a proper instruction was made below. (Null v. *City of Los Angeles*, (1988) 206 Cal.App.3d 1528, 1535.)

Next they argue the court improperly instructed the jury that, "a broker may have a reasonable expectation of compensation when he is the procuring cause of a buyer's purchase, even though the underlying oral agreement, if any, with the buyer is unenforceable. [¶] Now, it is for you the jury to determine the circumstances and whether or not the plaintiff's expectation was reasonable in the light of those circumstances." Under *Phillippe*, it is clear a broker cannot have a reasonable expectation of payment when the agreement is oral. (*Phillippe* v. *Shapell Industries, supra*, 43 Cal.3d at p. 1262.) But an element of the tort is the probability of future economic benefit. (*Buckaloo* v. *Johnson, supra*, 14 Cal.3d at p. 827.) The instruction given here was the trial court's effort to incorporate that

element in its instructions. Perhaps the wording could have been better, but the instruction did not reduce plaintiff's burden nor unreasonably focus the jury's inquiry on the subjective intent of MGW. The instruction was proper.

II

PREP Appeal

PREP was held liable on the theory it conspired to prevent MGW from receiving a broker's commission. It asserts the judgment must be reversed because Pacific Lighting cannot conspire with its wholly-owned subsidiaries, the judgment is not supported by substantial evidence, and MGW "has disproved interference." We disagree.

In support of its argument that a parent corporation cannot conspire with its wholly-owned subsidiaries, PREP relies on *Copperweld Corp.* v. *Independence Tube Corp.* (1984) 467 U.S. 752. In that case, the issue was whether the coordinated acts of a parent corporation and a wholly-owned subsidiary could constitute a "combination or conspiracy" under section 1 of the Sherman Antitrust Act. (*Id.* at p. 759.) In holding it could not, the United States Supreme Court noted that "The officers of a single firm are not separate economic actors pursuing separate economic interests, so agreements among them do not suddenly bring together economic power that was previously pursuing divergent goals. . . . For these reasons, officers or employees of the same firm do not provide the plurality of actors imperative for a § 1 conspiracy." (*Id.* at p. 769; see also *Klein* v. *Oakland Raiders, Ltd.* (1989) 211 Cal.App.3d 67, 76.)

Copperweld's analysis, which is well suited to the antitrust field, is ill suited to the civil conspiracy arena where the focus is not on whether there is a "combination" of economic power, but on whether an individual has joined with another to perpetrate a civil wrong. No California

case has applied *Copperweld* or its reasoning in this context (*MacManus* v. *A. E. Realty Partners* (1987) 195 Cal.App.3d 1106, 1110; see also *Pinhas* v. *Summit Health, Ltd.* (9th Cir. 1989) 894 F.2d 1024, 1033), and we are unwilling to do so when the evidence showed PREP was a separate entity wholly responsible for its own obligations. It purchased the project in its own name and assumed a large debt without a guarantee by its parent corporation. It participated, through its officers, in the decision not to pay MGW a commission. Under the facts adduced at trial, there is substantial evidence to support the judgment and to prove PREP interfered with MGW's economic relationship with Fredricks.

III

MGW Appeal

A

MGW asserts the trial court erred in granting Pacific Lighting's motion for judgment notwithstanding the verdict. We agree.

" 'A motion for judgment notwithstanding the verdict of a jury may properly be granted only if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence to support the verdict. If there is any substantial evidence, or reasonable inferences to be drawn therefrom, in support of the verdict, the motion should be denied.' [Citation.]" (*Hauter* v. *Zogarts* (1975) 14 Cal.3d 104, 110.)

The issue, then, is whether there is any substantial evidence which supports the jury's conclusion Pacific Lighting interfered, or conspired to interfere with, MGW's prospective economic advantage. Jim Hunter testified he was an employee of Pacific Lighting and was responsible for supervising its real estate subsidiaries, including Fredricks and Dunn. He was chairman of the board of the subsi-

diaries and was responsible for overseeing their real estate activities and sales. Hunter was involved in the decision as to whether MGW should be paid and he counseled against paying a commission on the ground the Rancho Carmel project was previously known to the Pacific Lighting group. From this testimony, the jury could reasonably conclude that Pacific Lighting participated in the decision to refuse to pay the real estate commission, and thus the motion for judgment notwithstanding the verdict should have been denied.

MGW also contends the trial court improperly granted Pacific Lighting's motion for new trial. Under Code of Civil Procedure section 657, an order granting a new trial "shall be affirmed if it should have been granted upon any ground stated in the motion, whether or not specified in the order . . . ." Although Pacific Lighting offers several reasons why the motion was properly granted, none have merit.

Pacific Lighting argues the court failed to properly instruct the jury as to the prerequisites for awarding punitive damages. But Pacific Lighting never asked for such instruction and thus any error on this point was waived. (*Null* v. *City of Los Angeles, supra,* 206 Cal.App.3d at p. 1535.) It then argues that, as a matter of law, a parent corporation cannot conspire with its wholly-owned subsidiaries. We rejected that argument above, however, when we affirmed the judgment against PREP for conspiracy to interfere. (*MacManus* v. *A. E. Realty Partners, supra,* 195 Cal.App.3d at p. 1110.) Next, Pacific Lighting argues the judgment was not supported by the evidence. That argument is meritless because Hunter's testimony established that Pacific Lighting participated in the decision to not pay MGW its commission. (See *Hauter* v. *Zogarts, supra,* 14 Cal.3d at p. 110.) Pacific Lighting contends the jury failed to reach a consensus on the issue of damages in violation of the "nine-juror rule," but it fails to demonstrate that less than nine jurors made the required find-

ing here. (*Juarez v. Superior Court* (1982) 31 Cal.3d 759, 766; *Earl* v. *Times-Mirror Co.* (1921) 185 Cal. 165, 182-186.) Finally, it argues the award of punitive damages is supported by insufficient evidence, and punitive damages are unconstitutional. However, there is sufficient evidence in the record to support the award, and punitive damages are constitutional under the Eighth Amendment (*Browning-Ferris* v. *Kelco Disposal* (1989) 109 S.Ct. 2909, 2912), and the due process provisions of the Fourteenth Amendment (*Bertero* v. *National General Corp.* (1974) 13 Cal.3d 43, 66, fn. 13, *Zhadan* v. *Downtown L.A. Motors* (1976) 66 Cal.App.3d 481, 501-502; but see *Pacific Mut. Life Ins. Co.* v. *Haslip* (Ala. 1989) 553 So.2d 537, 543, cert. granted April 2, 1990, 1990 U.S.L.W. 15078, No. 89-1279).

B

Home Capital and Humboldt, sellers of the property, escaped liability when the trial court granted their motion for nonsuit. MGW argues the motion should not have been granted because the evidence demonstrated the sellers participated in the conspiracy to interfere with payment of the commission. We disagree.

"A motion for nonsuit is tantamount to a demurrer to the evidence and presents a question of law: whether the evidence offered in support of the plaintiffs' case could justify a judgment in the plaintiffs' favor. [Citation.] In reviewing the propriety of the trial court's order granting the . . . motion . . ., we must accept plaintiffs' evidence as true . . . and resolve all conflicts and reasonable inferences in their favor. [Citations.]" (*Lussier* v. *San Lorenzo Valley Water Dist.* (1988) 206 Cal.App.3d 92, 98.)

Waitt was told at the outset that Home Capital would not pay him a broker's fee on sale of the project and that he would have to look to the buyer for any commission. While Home Capital entered into a letter of intent with Fredricks which provided it would not pay any broker's

commission, that was but a restatement of its consistent position that the buyer would be responsible for any commission. There was no evidence Home Capital signed the letter of intent to help Fredricks avoid paying a commission. Indeed, there was testimony Home Capital did not know Fredricks would refuse to pay a commission for locating the project. Since there was no evidence Home Capital and Humboldt conspired to interfere with MGW's prospective economic advantage, the motion was correctly granted.

C

The trial court granted judgment on the pleadings on the contract causes of action finding they were barred by the statute of frauds. (Civ. Code, § 1624.) MGW contends the statute of frauds does not apply because it was asked to locate a "business opportunity" and not real property. The contention is without merit.

A business opportunity is "the sale or lease of the business and goodwill of an existing business enterprise or opportunity." (Bus. & Prof. Code, § 10030.) However one may try to portray the "project" Fredricks was seeking when it told Waitt and other local brokers it was interested in acquiring a large residential project, Fredricks was not seeking a "business opportunity" as that term is defined in the Business and Professions Code. Waitt was asked to locate real property on which Fredricks could build homes. Since the basic purpose of the agreement was to locate real estate, the statute of frauds was applicable and required the broker's agreement to be in writing. (See *Phillippe* v. *Shapell Industries, supra*, 43 Cal.3d at p. 1255; *Tenzer* v. *Superscope, Inc.* (1985) 39 Cal.3d 18, 25-27.) Thus, the trial court properly granted the motion for judgment on the pleadings as to the contract causes of action. (See *Beck* v. *American Health Group Internat., Inc.* (1989) 211 Cal.App.3d 1555, 1565.)

DISPOSITION

The judgment is reversed as to Pacific Lighting, and is affirmed in all other respects. MGW to recover costs from Fredricks, Dunn, PREP and Pacific Lighting; Home and Humboldt to recover costs from MGW.

NOT TO BE PUBLISHED

SCOVILLE, J.*

WE CONCUR:

SONENSHINE, Acting P. J.

WALLIN, J.

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* Retired Presiding Justice of the Court of Appeal sitting under assignment by the Chairperson of the Judicial Council.

APPENDIX B

COURT OF APPEAL - STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
Division Three

G006654
Orange County No. 416196

MGW, INC.

v.

FREDRICKS DEVELOPMENT CORPORATION

COURT OF APPEAL-4TH DIST. DIV. 3
FILED

MAY 2 1990
Deputy Clerk

THE COURT:

The petition for rehearing is DENIED.

/s/ SCOVILLE, P.J.
Presiding Justice

We Concur:

/s/ SONENSHINE, J.
Justice

/s/ WALLIN, J.
Justice

cc: Orange County Clerk
All Counsel

APPENDIX C

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

Fourth Appellate District, Division Three, No. G006654
S015966
IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

SUPREME COURT
FILED

JUL 18 1990

Robert Wendorf Clark

DEPUTY

MGW INCORPORATED,

Appellant

v.

FREDRICKS DEVELOPMENT CORPORATION *Et Al.*,

Appellants

Petitions for review DENIED.

/s/ PANELLI
Acting Chief Justice

APPENDIX D

IN THE COURT OF APPEALS

FOURTH APPELLATE DISTRICT

STATE OF CALIFORNIA

DIVISION THREE

MGW, INC.,
Plaintiff and Appellant,

vs.

PACIFIC LIGHTING CORPORATION, *et al.*,
Defendant and Respondent.

APPEAL FROM THE SUPERIOR COURT
OF ORANGE COUNTY
HONORABLE SAMUEL B. TAYLOR, JR.
Superior Court Case No. 416196

BRIEF OF RESPONDENT
PACIFIC LIGHTING CORPORATION

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* * *

endowed with power to control corporate policy. Notwithstanding MGW's assertions to the contrary, none of which are supported by citation to the record, Hunter never testified, nor was he asked about, his ability to formulate

Pacific Lighting policy. Although MGW places great weight on Hunter's statement that "by and large I have always been an employee of Pacific Lighting", as already discussed, this statement was made in a colloquial manner after a specific factual description of Hunter's employment history, which indicated a long affiliation with Pacific Lighting *subsidiaries* only. In fact, the statement directly conflicted with all other factual statements regarding Hunter's employment history, and as recognized by the trial court, "it is clear this statement was a characterization, not a statement of actual fact." Order, p. 4.

In fact, even assuming, *arguendo*, that Hunter's statement regarding his status as a Pacific Lighting employee was true, there was no evidence presented as to his job title, the scope of his employment or authority, or the nature of his duties or responsibilities with Pacific Lighting. Without such additional evidence, it was impossible for the jury to determine whether Hunter was, indeed, an officer, director, or managing agent of Pacific Lighting as required under California Civil Code Section 3294(b). Thus, the trial court properly reversed the punitive damage award for lack of substantial evidence in support thereof.

B. The Jury's Unlimited Discretion To Mete Out Punishment In The Form Of Punitive Damages Violates The Due Process Clause Of The Fourteenth Amendment And The Excessivc Fines Clause Of The Eighth Amendment.

Not only was the jury's punitive damage award unsupported by the record, but it was clearly unconstitutional as well. In the past few months, the Supreme Court of the United States has made exceedingly clear its opinion that the essentially unrestrained discretion vested in juries to award "unlimited" punitive damages "may violate the due process clause" and that "the grant of wholly standardless discretion to determine the severity of [such] punishment appears inconsistent with due process." *See*

Banker's Life & Casualty Co. v. Crenshaw, ___ U.S. ___, 108 S.Ct. 1645, 1656, 100 L.Ed. 2d 62 (1988) (O'Connor, J. and Scalia, J. concurring). Moreover, the Court has indicated that such unfettered discretion may result in imposition of civil fines which greatly exceed the amount of fines imposed to punish comparable criminal conduct, a result which violates the Excessive Fines Clause of the Eighth Amendment to the United States Constitution. 108 S.Ct. at 1651 (noting that "whether the Eighth Amendment's Excessive Fines Clause serves to limit punitive damages in state civil cases . . . is a question of some moment and difficulty"). Although the Supreme Court has yet to definitively rule upon these issues, it has expressed the intent to resolve such questions in the context of a proper procedural challenge. This Court need not await such action, however, as the present case is one wherein the award of punitive damages clearly violates Pacific Lighting's rights under both the Due Process and Excessive Fines Clauses of the United States Constitution.

1. The Punitive Damage Award Flies In The Face Of Fundamental Concepts Of Due Process.

It is well-accepted in the present judicial system that the concept of "due process", as embodied in the Fourteenth Amendment to the Constitution, prohibits imposition of either civil or criminal punitive measures in the absence of clear guidelines limiting such awards.[8] In fact, the functional equivalents of modern day punitive damage awards, amercements and fines, have *always* been imposed within a system under which the maximum potential pen-

[8] The complete rejection in this country of the potential for unlimited, jury-imposed criminal fines supports a similar rejection under the Due Process Clause of unlimited, jury-imposed punitive fines in civil cases. No principled constitutional distinction can be drawn between criminal or civil fines as both are imposed to punish and deter. The Due Process Clause "is not to be avoided by the simple label the state chooses to fasten on its conduct or its statute." *Giaccio v. Pennsylvania*, 383 U.S. 399, 402, 86 S. Ct. 518, 15 L.Ed. 2d 447 (1966).

alty was known in advance by local rule, custom, or statute.[9]

Thus, although due process clearly permits sentencing authorities, whether judges or juries, considerable leeway in determining the appropriate *level* of punishment to be imposed in a particular case, such discretion is exercised only where its outer limits previously have been circumscribed and publicized. Once such limitation has been established, the maximum potential punishment for any given offense is readily ascertainable, and the amount of punishment actually imposed may be constrained by the Eighth Amendment. The Due Process Clause therefore fundamentally prohibits a system of unlimited punishments in which the amount imposed is calculated on an *ad hoc* basis in each case, even if the maximum amount is limited in some unspecified, nebulous, and ultimately meaningless fashion by the amount which the defendant is financially capable of paying.

Despite this prohibition, however, the parameters for awarding punitive damages have not yet been statutorily enunciated, an omission which, *perforce*, has resulted in a violation of Pacific Lighting's due process rights. In the present case, the jury did not receive one iota of guidance as to the standards for determining the amount of punitive damages imposed. As a result, Pacific Lighting essentially was at the mercy of an uncontrolled jury which could impose *any* amount of punitive damages, no matter how outrageous, without the threat of judicial censure. To allow such capricious awards not only serves to multiply a defendant's uncertainty as to the punishment which may

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[9] The fundamental principle that limits on punishments must be prescribed *in advance* of their imposition and that such limits may not be set by juries on an *ad hoc* basis is traced to the ancient latin canon, "Nullum Crimen, Nulla Poena, Sine Lege," the modern translation of which is: "There can be no crime, and no punishments, except as the law prescribes it." M. Frankel, Criminal Sentences 3 (1972).

accompany his "crime", but it nullifies the very concepts of fair play and justice embodied in the Due Process Clause itself.[10]

2. The Jury's Capricious Punitive Damage Award Constitutes An Excessive Fine Imposed In Violation Of The Eighth Amendment To The United States Constitution.

Moreover, to allow a jury the unfettered discretion to impose a "fine" in a civil case which greatly exceeds the monetary penalty imposed for a comparable crime violates both the letter and the spirit of the Excessive Fines Clause of the Eighth Amendment. The Eighth Amendment specifically provides that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. Const. amend. VIII. The theory underlying this prohibition is that a punishment must "fit" the crime and that crimes of equal magnitude should be punished similarly. *Solem v. Helm*, 463 U.S. 277, 284-85, 103 S.Ct. 300, 77 L.Ed. 2d 637 (1983). To the extent a civil jury, such as the one empanelled in the present case, has the power to impose an $800,000 fine for commission of a tort, intentional interference, which is a penalty amounting to roughly *800* times the penalty imposed for a comparable crime, fraud, such unrestrained punitive power leaves wide open the possibility that juries will "punish" civil defendants *not* in accordance with the magnitude of their "crime," but solely based upon their public image or the size of their bank accounts. Such a result completely defeats the purpose and protections of the

---

[10] Such uncontrolled jury awards also violate the due process rights guaranteed by the California State Constitution. Article I, Section 13 of the California Constitution provides that "no person shall be deprived of property without due process of law," a stricture which is to be construed identically in scope and purpose with the Due Process Clause of the federal constitution. Cal. Const. Art. I, § 3; *Gray v. Whitmore*, 17 Cal. App. 3d 1, 94 Cal. Rptr. 904 (1971).

Eighth Amendment, thereby rendering the verdict against Pacific Lighting herein clearly unconstitutional.

This conclusion is not altered by the fact that Pacific Lighting's "punishment" is meted out in the form of civil punitive damages rather than in the form of a jail sentence or a criminal fine. Although punitive damages are not labeled "criminal", they are completely analogous to criminal punishments. But for the fact that the Excessive Fines Clause appears in an amendment which, on its face, addresses subjects such as "bail" and "cruel and unusual punishments", topics commonly associated with criminal rather than civil cases, the plain language of the Excessive Fines Clause reasonably could be interpreted to fully apply to any monetary "fine" imposed in any civil or criminal proceeding, regardless of whether the purpose of such a "fine" is limited to punishment and deterence. The Court therefore properly may conclude that a monetary fine imposed exclusively for purposes of punishment and deterence, the classic objectives of criminal penalties (*Trop v. Dulles*, 356 U.S. 86, 96, 78 S.Ct. 590, 2 L.Ed. 630 (1958)), was intended by the framers of the Constitution to fall within the rubric of the Excessive Fines Clause. Thus, any punitive damage award should be imposed only pursuant to clearly articulated standards and limitations. As the jury's punitive damage verdict against Pacific Lighting was rendered in the absence of such guidelines, its award cannot withstand the scrutiny of constitutional review and must be reversed.

* * *

DATED: February 28, 1989 Respectfully submitted,

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CORPORATION

Supreme Court, U.S.
FILED
NOV 16 1990
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 90-626

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

PACIFIC LIGHTING CORPORATION,
FREDRICKS DEVELOPMENT CORPORATION, and
DUNN PROPERTIES CORPORATION,

Petitioners,

v.

MGW, INC.,

Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT

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I. INTRODUCTION.

This case does not belong here. Petitioners Dunn Properties Corporation and Fredricks Development Corporation are without jurisdiction here since they did not preserve *any* Due Process claim in the California courts, and petitioner Pacific Lighting asks this Court to answer questions far different than the lone point it presented to the California Court of Appeal.

In addition, the record in this case is terrible on any Due Process issue. Petitioners did not object to the punitive damage jury instruction that was given. They may even have proposed it. The record is barren on this point. Petitioners Dunn and Fredricks, who never raised the issue prior to this Court, affirmatively kept out evidence at trial (such as financial information concerning their net worth and income) that would be relevant to a Due Process claim. Nor is there any record of the adequacy of the process California provides to a defendant since petitioners never asserted their rights under California law to attack the punitive damage verdict.

Nor should this case be held pending decision in Pacific Mutual Life Ins. Co. v. Haslip, 110 S. Ct. 1780 (1990). On the merits, California law on the assessment of punitive damages does not raise the same Due Process concerns as are presented by the law of Alabama before the Court in Haslip. California requires a relationship between actual harm and the amount of punitive damages assessed, precludes punitive damages based upon *respondeat superior* except where a managing agent is involved, and requires a proof of malice, fraud, or oppression by clear and convincing evidence. After trial, the judge who presided sits as a thirteenth juror and must reduce the punitive damages if, in his "independent judgment", they are excessive. On appeal

there is a further review for excessiveness. Whether Due Process is determined by contemporary standards or by reference to prevailing law at the time of adoption of the Fourteenth Amendment, this scheme provides all the protections due to petitioners.

II. STATEMENT OF THE CASE.

A. Statement Of Facts.

The facts are set forth in some detail in the California Court of Appeal decision, and will not be repeated here. MGW will only note that petitioners soft-pedal the essence of the factual findings against them that support the verdict. The gist of the matter is that the jury found by clear and convincing evidence that the defendants conspired to cheat MGW of a brokerage commission by concocting a fictional account[1] of how they became involved in the deal that they eventually consummated.

The case went to the jury under the 1987 amendments to the California punitive damages statute. In fact, it was one of the first cases tried under the new law. Those amendments required the jury to find by clear and convincing evidence either fraudulent, malicious, or oppressive conduct in order to award punitive damages.

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[1] MGW had brought the property to Fredricks' attention. However, Fredricks refused to pay MGW a commission on the ground that Dunn, its joint venture partner, was already working on the deal. The evidence at trial also established that Dunn had refused to pay a commission to its broker on the ground that Fredricks had located the property. The result was that even though, either way, a brokerage commission was due someone, none was paid.

The actual damages awarded in this case are $773,200.00.[2] The punitive damages assessed against Pacific Lighting, $800,000, are only slightly higher than the actual damages. In fact, the jury tailored the punitive damage award to the individual defendants found to have cooperated in the scheme, assessing awards of $-0-, $400,000, $800,000, and $800,000 against the various defendants based upon their differing culpabilities.

B. The Federal Issue.

Petitioners simply have not preserved either the issue they now present, or the record that would support their position. The following chronology brings some perspective to the matter:

1. At no time was a federal issue raised by *anybody* at the trial court level.

2. On appeal, petitioners Dunn and Fredricks, who were seeking reversal of the judgment against them, did not raise at any point a federal issue.

3. After Dunn and Fredricks had failed to assert a federal issue in their brief, Pacific Lighting (represented by different counsel), which was seeking to uphold the judgment in its favor (the verdict against it having been vacated by the trial judge), argued in support of the defense judgment that the California scheme for assessment of punitive damages violates Due

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[2] Petitioners state that the compensatory damages were $558,000. This is incorrect on two counts. First, the amount of actual damages found by the jury was $585,000, not $558,000. In addition, the jury also found that an additional $185,200 was due as prejudgment interest, considered compensatory damages under California law. Harsany v. Cessna Aircraft Co., 148 Cal. App. 3d 1139, 1142, 196 Cal. Rptr. 374 (1983). Petitioners' statement of facts thus makes it appear that the ratio of punitive to actual damages was larger than, in fact, it was.

Process *because it does not set a ceiling in advance on the amount of punitive damages that can be assessed.*[3] See Appendix D to the Petition For Certiorari. This argument was rejected summarily.[4]

Pacific Lighting also asserted (albeit on state law grounds) that the punitive portion of the judgment could not stand because the jury had not been adequately instructed concerning the standards for imposition of punitive damages. The Court of Appeal refused to reach this issue since it had been waived by the failure to raise the issue at trial:

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[3] Pacific Lighting argued:

> Thus, although due process clearly permits sentencing authorities, whether judges or juries, considerable leeway in determining the appropriate level of punishment to be imposed in a particular case, such discretion is exercised only where its outer limits previously have been circumscribed and publicized. Once such limitation has been established, the maximum potential punishment for any given offense is readily ascertainable, and the amount of punishment actually imposed may be constrained by the Eighth Amendment....
>
> As a result, Pacific Lighting essentially was at the mercy of an uncontrolled jury which could impose any amount of punitive damages, no matter how outrageous, without the threat of judicial censure.

The contention of Pacific Lighting, far from arguing that standards were required below the ceiling, in fact acknowledged that considerable discretion exists as to the amount of punitive damages assessed.

[4] The Court made only the following cursory comments:

> Finally, it argues the award of punitive damages is supported by insufficient evidence, and punitive damages are unconstitutional. However, there is sufficient evidence in the record to support the award, and punitive damages are constitutional under the Eighth Amendment (Browning-Ferris v. Kelco Disposal, 109 S. Ct. 2909, 2912 (1989)), and the due process provision of the Fourteenth Amendment (Bertero v. National General Corp., 13 Cal. 3d 43, 66, fn. 13 (1974); Zhadan v. Downtown L.A. Motors, 66 Cal. App. 3d 481, 501-502 (1976); but see Pacific Mut. Life Ins. Co. v. Haslip (Ala. 1989) 553 So. 2d 537, 543, Cert. granted April 2, 1990, 1990 U.S.L.W. 15078, No. 89-1279).

> Pacific Lighting argues the court failed to properly instruct the jury as to the prerequisites for awarding punitive damages. But Pacific Lighting never asked for such instruction and thus any error on this point was waived. (Petition For Certiorari, App. A, p. 11a)

In light of the argument advanced by Pacific Lighting, the Court of Appeal opinion must be construed as saying: "We reject Pacific Lighting's contention that punitive damages are unconstitutional because there is no maximum limit set in advance." There is nothing in the opinion which discusses or decides what standards are required for punitive damages to be imposed.

III. THE PETITION AS TO DUNN AND FREDRICKS MUST BE DENIED FOR FAILURE TO PRESERVE ANY DUE PROCESS CLAIM IN THE CALIFORNIA COURTS.

A. Dunn And Fredricks Never Raised A Due Process Issue At Trial Or On Appeal.

Dunn and Fredricks did not raise the constitutional issue in the trial court. They did not raise it in the California Court of Appeal. No California court has addressed the Dunn and Fredricks Due Process claim. There is simply no *jurisdiction* under 28 U.S.C. section 1257 for Dunn and Fredricks to be in this Court. Dunn and Fredricks' failure to comply with valid California appellate procedure provides an adequate and independent state ground for decision. Board of Dirs. of Rotary Inter. v. Rotary Club, 481 U.S. 537, 550 fn. 9 (1987) [where issue first raised on rehearing petition to California Court of Appeal, which was denied, after which the California Supreme Court denied review, this

Court would not reach issue], see also, Hoover v. Ronwin, 466 U.S. 558, 574, fn. 25 (1983).

B. Dunn And Fredricks Cannot Come Into This Court On Pacific Lightings' Coattails.

Dunn and Fredricks do not contest their failure to raise the issue before the California courts. Instead, they assert that since Pacific Lighting raised a Due Process claim, which was addressed, they are entitled to redress here.[5]

Dunn and Fredricks should not be allowed to take advantage of the totally fortuitous fact that the judgment in Pacific Lighting's favor was reversed. There can be no question that, had the judgment in Pacific Lighting's favor been upheld, Pacific Lighting would have nothing to petition this Court about. Even if the judgment had been reversed, and the matter had been remanded for a new trial[6], Pacific Lighting would have had no basis to bring the non-final case here.

In either of those events, Dunn and Fredricks would have been in the procedurally indefensible position of petitioning this Court for certiorari where neither they, nor any other certiorari petitioner, had even remotely preserved the federal issue. The happenstance that Pacific Lighting's judgment became final for certiorari purposes at the same time as did the Dunn and Fredricks judgment should not entitle Dunn and

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[5] Even if Dunn and Fredricks were entitled to the same consideration as is Pacific Lighting, certiorari should be denied for all of the reasons discussed infra in connection with Pacific Lighting.

[6] The trial judge granted a new trial motion in Pacific Lighting's favor, conditional on the reversal of the j.n.o.v. In conformity with California practice, if the j.n.o.v. is reversed, then the new trial order is effective and a retrial takes place (unless, of course, the new trial order is also reversed as was the case here).

Fredricks to greater rights before this Court than they themselves preserved.

Dunn and Fredricks excuse their failure to preserve any Due Process issue only briefly in a footnote[7]. The essence of their position is that they should be treated exactly the same as Pacific Lighting. But throughout this litigation, they occupied very different positions from Pacific Lighting. Where Pacific Lighting sought affirmance of a judgment in its favor, Dunn and Fredricks sought reversal of the judgments against them, and were therefore far more *restricted* in the arguments they could advance on appeal. They have been represented on appeal by separate counsel, and have urged different arguments before the California appellate courts. Each of these parties should be judged individually based on the merits of each party's position.

Dunn and Fredricks' argument to the contrary is based upon a number of silent assumptions that do not survive scrutiny:

Assumption 1 - That, under California law, the objection of one party can inure to the benefit of another. The opposite is the case. A party is not entitled to rely on the objection of a co-party. People v.

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[7] They state: "Although petitioners Dunn and Fredricks did not raise a federal due process challenge to the punitive damage award in the Court of Appeal, Pacific Lighting's challenge necessarily placed the entire punitive damage award in constitutional jeopardy. Furthermore, as indicated by the Court of Appeal's opinion in this case, see App. A. infra, 12a, the Supreme Court of California unequivocally has rejected both federal and state due process attacks on that State's vague and open-ended punitive damage system. Under these circumstances, it was not necessary for Dunn and Fredricks to raise such issues in the trial court or Court of Appeal as a matter of state law. See, e.g., Moradi-Shalal v. Fireman's Fund Insurance Companies, 46 Cal. 3d 287, 292, 250 Cal. Rptr. 116, 758 P.2d 58 (1988) (defendant was not required to raise issue in the lower courts because "clearly it would have been pointless for defendant to urge either the trial or appellate court to overrule one of our decisions")."

Jacobs, 195 Cal. App. 3d 1636, 1656, 241 Cal. Rptr. 550 (1987) ["Owen's argument fails for another, and more fundamental, reason: it was Jacobs and not he that objected to the reenactment. 'On appeal, a defendant cannot taken advantage of the objections made by a codefendant in the absence of a stipulation or understanding to that effect.' [Citations.] Owen's failure to personally object waived any claim of error that might be heard to make. [Citations.]"]. See also, People v. Brown, 110 Cal. App. 3d 24, 35, 167 Cal. Rptr. 557 (1980); People v. Wright, 216 Cal. App. 2d 866, 871 (1963); People v. Adame, 169 Cal. App. 2d 587, 599, 337 P.2d 477 (1959) Cert. denied 361 U.S. 969 (1960); People v. Duran, 57 Cal. App. 2d 363, 370, 134 P.2d 305 (1943).[8]

Assumption 2 - That Pacific Lightings' argument placed the award against Dunn and Fredricks in "constitutional jeopardy". However, factually, Pacific Lighting's challenge in the Court of Appeal[9] did not

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[8] The California rule follows the general rule that co-party objections are insufficient to preserve an issue. See 4 C.J.S. Section 251, and cases cited therein ["If several parties are entitled to make an objection, and it is made by any number less than all, it does not inure to the advantage of the party or parties not joining in it."]; Osterneck v. E.T. Barwick Industries, Inc., 825 F.2d 1521, 1533 (11th Cir. 1987) ["One may not rely on the objections made by co-parties to the action, but, rather must expressly adopt a co-parties' objection as his own."]; Kenney v. Lewis Revels Rare Coins, Inc., 741 F.2d 378, 382 (11th Cir. 1984) [co-party's objection insufficient to preserve issue].

[9] The Court of Appeal brief of Pacific Lighting states:

> This Court need not await such action, however, as the present case is one wherein the award of punitive damages clearly violates Pacific Lighting's right under both the Due Process and Excessive Fines Clauses of the Untied States Constitution. Despite this prohibition, however, the parameters for awarding punitive damages have not yet been statutorily enunciated, an omission which, perforce, has resulted in a violation of Pacific Lighting's due process rights....As a result, Pacific Lighting essentially was at the mercy of an uncontrolled jury which could impose any amount of punitive damages, no matter how outrageous, without the threat of judicial censure. (App. D. p. 19a-20a of Petition For Certiorari.)

even attempt to place the punitive award against Dunn and Fredricks in "constitutional jeopardy", but instead asserted only its own Due Process rights[10] in an effort to protect the judgment in its favor.

Assumption 3 - That assertion of a Due Process issue by Pacific Lighting could overcome the *jurisdictional* bar against Dunn and Fredricks. Failure to adequately preserve an issue may result in consider-ation being denied here for either prudential *or* jurisdictional reasons. Where only prudential consider-ations apply, countervailing prudential considerations, such as those advanced by Dunn and Fredricks, may militate in favor of review. But where, as here, jurisdiction is lacking, prudential arguments are irrelevant.

28 U.S.C. section 1257 requires that a litigant preserve an issue in the highest state court in which review may be had in order for there to be jurisdiction on certiorari. Street v. New York, 394 U.S. 576, 581-2 (1969). As Street recognizes, where the state court has not decided a federal issue, "it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary. [Citations.]" See also, Cox v. Texas, 202 U.S. 446 (1906) [failure of state appellate court to reach issue presumed to result from failure to raise issue in trial court].

This court has never held that a party which has utterly failed to preserve a federal issue in state court

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These passages make clear that Pacific Lighting was seeking only to assert its own due process rights, not those of Dunn and Fredricks.

[10] As has been noted by this Court on numerous occasions, which are discussed infra, constitutional rights are personal and must be asserted by the party whose rights have been violated.

may, nonetheless, seek relief here on a showing that assertion of the federal issue in state court would have been futile. Preservation of the issue is jurisdictional, much like a notice of appeal. One who fails to appeal is subject to the judgment, even though a co-party successfully appeals on an issue equally applicable to the non-appealing party.

Assumption 4 - Dunn and Fredricks assume that, because Pacific Lighting was allowed to raise a Due Process issue for the first time on appeal, they would have been as well. They are wrong. Pacific Lighting was entitled to raise the issue because it was seeking affirmance of the judgment in its favor. Dunn and Fredricks, who were seeking reversal, would not have been so entitled.

The California courts allow a party to assert on appeal arguments not preserved below where the argument is asserted to *support* the judgment. In Davey v. Southern Pacific Co., 116 Cal. 325 (1897), the California Supreme Court stated:

> "The respondent is at liberty to suggest any ground that he may choose to show that the ruling was right, whether advanced in the discussion below or not. If the testimony had been admitted, and Clark had appealed, he would have been required to confine himself to objections specifically taken at the trial and stated in the record. The distinction is between the case of a party seeking to reverse a judgment and that of a party resisting the attempt." Id. at 331

This rule has been consistently followed by the California courts. Green v. Superior Court, 40 Cal. 3d 126, 138, 219 Cal. Rptr. 186, 707 P.2d 248, 219 (1985) Cert. denied 475 U.S. 1087 (1986) [affirming on ground not raised below, recognizing different rule where reversal sought, citing Davey]; Philip Chang & Sons Associates v. La Casa Novato, 177 Cal. App. 3d 159, 173, 222 Cal. Rptr. 800 (1986) [if evidence objectionable on any ground, case will be affirmed, even if ground not raised below].[11]

The requirement that issues be squarely raised below fills the critical function of allowing the state court to determine whether an adequate and inde-pendent state ground for decision exists. Webb v. Webb, 451 U.S. 493, 500 (1981). Here, because Dunn and Fredricks failed to raise a Due Process issue in the Court of Appeal, that Court could not decide whether California procedural rules barred them from asserting a Due Process issue. Therefore, jurisdiction here must rest on the dubious *assumption* that *if* the California Court had addressed the issue, it would have decided it on the *federal*, not the *state*, ground. Under Webb, this is impermissible.

IV. PACIFIC LIGHTING'S PETITION FOR CERTIORARI ALSO SHOULD BE DENIED.

Pacific Lighting's petition makes broad statements to the effect that Due Process challenges to punitive damage awards are of great interest to this Court, in effect lumping together all manner of possible Due Process claims related to punitive damages as though they constitute one undifferentiated question. The unstated contention is that this case is another Haslip

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[11] This Court follows the same practice. City of Revere v. Massachusetts General Hosp. 463 U.S. 239, 244, fn. 6 (1983); Dandridge v. Williams, 397 U.S. 471, 475, fn. 6 (1970). See Browning-Ferris Industries v. Kelco, ____ U.S. ____, 109 S. Ct. 2909, 2921, fn. 23 (1989).

clone that should simply be held pending decision in that case. In fact, this case is very different than Haslip. Nothing that could result from that case will be dispositive here.

Once one acknowledges that bare-bones jurisdiction to review one limited issue, the "ceiling" issue, does exist, there is nothing about Pacific Lighting's petition that can commend itself to this Court. In fact, the Pacific Lighting petition is drafted with a view towards making it into the "Haslip pile", rather than attempting to state a good case in its own right.

Pacific Lighting's approach seeks to avoid the serious problems with the record in this case. That record is largely barren as to what happened at trial since discussions concerning the punitive damage instruction were off the record. Certainly, no objection was preserved. Nor was any effort made by Pacific Lighting to invoke California protections against excessive punitive damage awards. This case, therefore, presents an attack against the California procedure whose workings are not disclosed by the record. What is more, despite the fact that this case has gone through the Petition For Certiorari, we still know virtually nothing about what it is that Pacific Lighting feels it is entitled to under the Due Process clause. While it clearly wants a ceiling (whether treble damages, a set dollar figure, a percentage of net worth, or any one of these, will do is not yet clear), what other "standards" it seeks are still unknown.[12]

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[12] Without question, Pacific Lighting desires as yet unspecified standards concerning the "conduct that may be punished" (Question presented). However, there is nothing in any brief in the California courts which remotely raises any issue concerning what "conduct that may be punished". What other standards, if any, Pacific Lighting is seeking here (as opposed to what was raised below), the certiorari petition leaves unstated.

For these reasons, the petition of Pacific Lighting should be denied forthwith, not be put aside to await Haslip.

A. The Record Is Inadequate.

In this case, there has been neither a factual record nor full and explicit consideration of the issue by the Court of Appeal. For example, many of the most important factual issues that could be relevant to a Due Process claim are absent from the record since the Due Process issue was not raised in the trial court. Primary among these is a good record concerning how and at whose instance the punitive damages instruction reached its final form[13] or the worth of the defendants in order to assess the propriety of the punishment.[14] Nor did any of the defendants assert by way of objection or otherwise in the trial court the Due Process protections to which they now feel entitled. That being

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Pacific Lighting seeks to camouflage the fact that it has changed arguments between the California Court of Appeal and here. The argument below was that as a substantive matter due process requires a maximum ceiling, set in advance. Here, the argument is advanced that California does not provide sufficient standards for the imposition of punitive damages. Petitioners seek to bridge the gap between the two arguments in two ways. First, they cut and paste the Pacific Lighting Court of Appeal brief to make it appear as though the issue was raised below, when it was not. Second, recognizing that the "ceiling" argument advanced below is woefully weak, they seek to transform the issue from whether or not a ceiling is required to what standards are required if there is no ceiling. However, the argument that there must be a ceiling is quite different than one which, assuming a ceiling is not constitutionally necessary, seeks other protections.

[13] MGW offered a punitive damage instruction, which was not given. The instruction that was given was the California form jury instruction, BAJI 14.71. Assumedly, a defendant requested the BAJI instruction which was given. Because the instant due process issue was not raised at that time, no one made any effort to preserve a record on the point.

[14] MGW requested information concerning the net worth of all of all of the defendants, to which the defendants objected with the result that only the annual report of Pacific Lighting was introduced into evidence.

the case, there is no way of knowing whether the trial court would have provided additional protections, or even whether MGW would have agreed to such protections in order to avoid a later Due Process challenge.[15] (Such an agreement is far from being far-fetched since MGW, in its closing argument to the jury, requested an assessment of $3,000,000 against all of the defendants. RT 1434/10-13.)

Strong policy reasons advise against consideration of the Pacific Lighting petition. This Court has made it abundantly clear that it will not decide issues concerning possible Due Process limitations on the award of punitive damages in a case which was not adequately presented to the state courts. In Bankers Life and Cas. Co. v. Crenshaw, 108 S. Ct. 1645, 1649-50 (1988), the petitioner had advanced in the Mississippi state court an argument that the punitive damage award against it violated federal Due Process. In this Court, Bankers Life against asserted a denial of Due Process, but changed the thrust of its argument. Where it had challenged the "chilling effect" of punitive damages in Mississippi, here it had attacked only the size of the award against it. Id. at 1649, n. 1. Therefore, this Court concluded that "these claims were not raised and passed upon in state court, and we decline to reach them here." Id. at 1649.

Likewise, in Browning-Ferris Industries v. Kelco Disposal, Inc., 109 S. Ct. 2909, 2921, the Court refused to reach the merits of a Due Process claim. There, the petitioner argued that the Due Process claim fell within the "clear intendment" of the points raised below. However, the Court, noting the issues preserved were

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[15] "To entitle objections to consideration here, they must be presented to the court below in the first instance, at least if they are of a kind which might have been there obviated." Houghton v. Jones, 68 U.S. 702, 705 (1863).

based upon the common law and the Eighth Amendment, "in the absence of a developed record on the issues relevant to this Due Process inquiry," refused to expand the inquiry to the Fourteenth Amendment, at least where reversal, rather than affirmance, was sought. Id., n. 23.

These decisions follow in the tracks of a long line of cases which demonstrate the reluctance of this Court to address important issues on inadequate records. For example, in Illinois v. Gates, 462 U.S. 213, 221 (1983), the Court had invited argument on whether the Fourth Amendment exclusionary rule should be relaxed where the police had acted in good faith. However, the Court ultimately decided that its request was improvident in light of the undeveloped record in the case:

> We have identified several purposes underlying the "not pressed or passed upon" rule...First, "[q]uestions not raised below are those on which the record is very likely to be inadequate since it certainly was not compiled with those questions in mind." [Citation.].... Here, for example, the record contains little, if anything, regarding the subjective good faith of the police officers that searched the Gateses' property--which might well be an important consideration in determining whether to fashion a good-faith exception to the exclusionary rule. Our consideration of whether to modify the exclusionary rule plainly would benefit from a record containing such facts. Id. at 221.

> Moreover, fidelity to the rule guarantees that a factual record will be available to us, thereby discouraging the framing of broad rules, seemingly sensible on one set of facts, which may prove ill-considered in other circumstances. Illinois v. Gates, 462 U.S. at 224.

See also, Morrison v. Watson, 154 U.S. 111 (1894).

DeBacker v. Brainard, 396 U.S. 28 (1969), presents a case quite similar to this one as regards the state of the record. The Court refused to reach the merits, stating:

> The record shows (1) that appellant did not make this contention before the juvenile court judge: (2) that appellant raised the issue in his habeas corpus petition but that it was not passed on by the Nebraska District Court; (3) that appellant did not press the District Court's failure to consider this issue in his appeal to the Nebraska Supreme Court, and made only passing reference to the issue in his brief to that court; and (4) that the opinions of the Nebraska Supreme Court, 183 Neb. 461, 161 N.W.2d 508 did not pass on the issue, nor even refer to the contention. Given the barrenness of the record on this issue, in the exercise of our discretion, we decline to pass on it. Id. at 32.

The record in this case is even less attractive than in these cases. It does not provide a good foundation for plenary review.

B. Pacific Lighting's Failure To Assert Its Rights Under California Law Renders It Impossible To Adjudicate Any Claim Concerning Adequate Standards.

California provides numerous protections to defendants in punitive damage cases. While Pacific Lighting may argue that those protections are not sufficient, it cannot, and does not, deny that they exist.

Those protections can be summarized as follows:

(1) At trial, the jury is instructed[16] that it may

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[16] The jury was instructed:

If you find that MGW suffered damage as a proximate result of any of the defendants' conduct on which you base a finding of liability, you may then consider whether you should award punitive damages against that defendant, or those defendants, for the sake of example and by way of punishment. You may in your discretion award such damages if, but only if, you find by clear and convincing evidence that said defendant was guilty of fraud or malice in the conduct on which you base your finding of liability.

Malice means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights of others.

A person acts with conscious disregard of the rights of others when it is aware of the probable economic consequences of its conduct and willfully and deliberately fails to avoid those consequences.

"Despicable conduct" is conduct which is so vile, base, contemptible, miserable, wretched or loathsome that it would be looked down upon by ordinary decent people.

Fraud means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal right or otherwise causing injury.

The law provides no fixed standards as to the amount of such punitive damages, but leaves the amount to the jury's sound discretion, exercised without passion or prejudice.

In arriving at any award of punitive damages, you are to consider the following: 1. The reprehensibility of the conduct of the defendant; 2. The

assess punitive damages only where it finds the defendant guilty of certain offenses.

(2) The jury must also find a mental element, "malice, fraud, or oppression", which are defined to the jury and which involve conscious wrongdoing.

(3) The jury may only assess punitive damages upon proof by clear and convincing evidence.

(4) A corporation may be assessed punitive damages only upon a finding that a managing agent of the corporation was guilty of the wrongdoing.[17]

(5) The jury is instructed that the amount of punitive damages must bear a reasonable relationship to actual harm. Gagnon v. Continental Cas. Co., 211 Cal. App. 3d 1598, 1603, 260 Cal. Rptr. 305, 307 (1989).

(6) The jury is instructed that the damages should be of an amount sufficient to deter and punish.

(7) After the verdict, the jury award is reviewed by the judge, sitting as a thirteenth juror, who must reduce the award if, in his "independent judgment", it

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amount of punitive damages which will have a deterrent effect on the defendant in the light of defendant's financial condition; 3. That the punitive damages must bear a reasonable relation to the actual damages.

If you find that MGW is entitled to an award of punitive damages against defendant, you shall state the amount of punitive damages separately in your verdict. CT 876-7.

17 No such instruction was given in this case because none was requested. However, there is no question but that Hunter, the actor for Pacific Lighting, was a managing agent. Moreover, the Court of Appeal held that the failure to request the instruction constituted a waiver of the claim. The United States Supreme Court will not consider the claim under such circumstances. See, e.g., Henry v. State of Mississippi, 379 U.S. 443 (1965).

is excessive.[18]

(8) On appeal, the award again is reviewed for excessiveness.[19] See, e.g., People v. Grocers Wholesale Co., 214 Cal. App. 3d 498, 514, 262 Cal. Rptr. 689, 699

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[18] "[T]he trial court, in ruling on the [new trial] motion, sits not in an appellate capacity but as an independent trier of fact." Neal v. Farmers Ins. Exch., 21 Cal. 3d 910, 933, 148 Cal. Rptr. 389, 402, 582 P.2d 980 (1978). California Code of Civil Procedure section 662.5 provides for the trial court to issue a remittitur "of so much [of the verdict] as the court in its independent judgment determines from the evidence to be fair and reasonable".

That due process can be satisfied by review by judges of a jury verdict is established by Clemons v. Mississippi, ____ U.S. ____, 110 S. Ct. 1441 (1990). The Court held that the Fourteenth Amendment does not require that the death penalty be imposed by the jury, and that the state courts could impose the death penalty by applying a constitutionally permissible standard even after a jury had returned a verdict of death under erroneous instructions. While factually and procedurally Clemons presents a very different case from this one, Clemons establishes that due process is not offended by a scheme which, when taking into account independent review by judges after return of the verdict, offers sufficient protections to meet due process, even if the process afforded through return of the verdict is, standing alone, constitutionally insufficient.

See also, Schall v. Martin, 467 U.S. 253, 280-1, 104 S. Ct. 2403 (1984) [procedures for review of detention determination "provide a sufficient mechanism for correcting on a case-by-case basis any erroneous detentions ordered under Section 320.5(3). Such procedures may well flesh out the standards specified in the statute."], Huron Valley Hosp., Inc. v. City of Pontiac, 887 F.2d 710 (6th Cir. 1989); Newberger v. United States Marshals Service, 751 F.2d 1162, 1167 (11th Cir. 1985); Creative Environments, Inc. v. Estabrook, 680 F.2d 822, 833 (1st Cir. 1982), cert. denied 459 U.S. 989; Bossetta-Goodman v. Datacom Systems Corp., 644 F.S. 354, 358 (E.D.La. 1986), affirmed 820 F.2d 1222; Groves v. Cox, 559 F.S. 772 (E.D.Va. 1983).

[19] Petitioners lay great stress on the "passion and prejudice" standard which is applied in California, albeit in a greatly modified form. (Where the appellate court finds the award excessive, "it is presumptively the result of passion and prejudice, and cannot be sustained." People ex rel. Dept. of Transportation v. Grocers Wholesale Co., 214 Cal. App. 3d 498, 262 Cal. Rptr. 689 (1989). In essence, the size of the award is the controlling factor.) However, even petitioners acknowledge that the standard applies "on appeal" (Petition For Certiorari, p. 11). They ignore entirely the non-deferential review of the trial judge. In essence, their argument is that due process precludes application of the "passion and prejudice" standard on appeal even though the "independent judgment" standard applies to the trial judge.

(1989); Dumas v. Stockter, 213 Cal. App. 3d 1262, 262 Cal. Rptr. 311, 314 (1989); Wollersheim v. Church of Scientology, 212 Cal. App. 3d 872, 906, 260 Cal. Rptr. 331, 353 (1989), cert. denied 110 S. Ct. 1937; Kaye v. Mount La Jolla Homeowners Ass'n., 204 Cal. App. 3d 1476, 1492-93, 252 Cal. Rptr. 67, 77 (1988).

MGW believes that this system fully comports with Due Process. However, if this Court is inclined to pass judgment on the California system, it should at least do so in a case where the record discloses how the system worked at each step of the way. The State of California is owed at least that much. This case does not do that because Pacific Lighting failed to invoke its rights under California law, both at trial and, more importantly, after trial and on appeal. It has never sought reduction of the punitive damage award on excessiveness grounds.[20] The burden is upon *it* to demonstrate that the state remedy is not adequate, not upon MGW to prove its adequacy. Huron Valley Hosp., Inc. v. City of Pontiac, 887 F.2d 710, 716 (6th Cir. 1989). Certainly, petitioners cannot sustain their burden of demonstrating that California procedure fails to meet Due Process requirements on the existing record.

Pacific Lighting's petition to this Court ignores the fact that, in determining whether the California system provides Due Process, the *entire* system must be examined. That system does not come grinding to a halt upon the reading of the verdict. Pacific Lighting cannot freeze this case in time, ignoring available post-trial and appellate remedies.

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[20] Pacific Lighting states: "The Court of Appeal did not engage in any apparent analysis of the amount of the award." [p. 9, Petition For Certiorari.] The reason is that it never asked it to.

Parratt v. Taylor, 451 U.S. 527 (1981), *overruled on other grounds*, Daniels v. Williams, 474 U.S. 327 (1986),[21] is instructive here. In that case, a convict whose hobby supplies were lost by prison officials through their failure to follow normal prison procedures for handling in-coming mail, alleged that he had been deprived of his property in violation of Due Process. Even assuming that a deprivation had occurred, the Court found that showing a deprivation is not enough; the deprivation had to be without Due Process of law. Therefore, it was necessary to evaluate the entire system, not just part of it up through a particular point in time. The fact that the convict had not availed himself of procedures to compensate him for the loss did not allow him to bootstrap himself into a Due Process claim as though those procedures did not exist:

> Moreover, the State of Nebraska has provided respondent with the means by which he can receive redress for the deprivation....This procedure was in existence at the time of the loss here in question *but respondent did not use it*. [Emphasis added.] Id. at 544-5.

Pacific Lighting did not pursue its California post-verdict remedies. Had it done so, this Court at least would know how California treated Pacific Lighting's claim, and would have the considered judgment of the California courts on whether the award should have been reduced and why.

Instead, if certiorari is granted, the parties' theoretical discussion concerning what California courts would have done with this case will have to substitute for a record showing how the California protections

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[21] Parratt had assumed that a negligent act could give rise to a Section 1983 action. Daniels overruled Parratt on this point.

actually operated in *this* case. This Court does not sit to render its best guess as to what California would have done, but to decide cases based upon an adequate record squarely setting forth the constitutional issue. This is not such a case.

C. Failure To Have Objected In The Trial Court Precludes Consideration By This Court.

In City of Springfield, Mass. v. Kibbe, 480 U.S. 257 (1987), the petitioner sought reversal of an award against it. It had not, however, objected to the jury instruction on which it was based. Despite the fact that the Court of Appeals addressed the issue, this Court declined to do so where no objection had been lodged in the trial court:

> The Dissent argues that we need not concern ourselves about Springfield's failure to preserve this issue, because it was passed on by the Court of Appeals below. Dissent, at 1118-9. There is doubtless no jurisdictional bar to our reaching it, whether or not the Court of Appeals did so. [Citation.] We think, however, that there would be considerable prudential objection to reversing a judgment because of instructions that the petitioner accepted, and indeed itself requested. Id. at 1116.

See also, United States v. Atkinson, 297 U.S. 157, 159 (1936); Beckley Newspapers Corp. v. Hanks, 389 U.S. 81, 82 (1967).

As is discussed above, Pacific Lighting did not object to the instruction given, one that differed from the one that MGW proposed and which, therefore, could well have been modified at Pacific Lighting's request. Any doubt on the issue must be resolved against Pacific

Lighting which bears the burden to bring to this Court a record that affirmatively supports its right to relief. Cunningham v. Springer, 204 U.S. 647 (1907) [Court would not assume error where not affirmatively shown from the record], Texas & P. Ry. Co. v. Volk, 151 U.S. 73 (1894) [request for additional instruction not presumed -- must appear from record]. In fact, under the authority of Kibbe, the Seventh Circuit has rejected a challenge to a punitive damage instruction for failure to have objected at trial. Williamson v. Handy Burron Mach. Co., 817 F.2d 1290, 1295 (7th Cir. 1987). See also, Mairena v. Foti, 816 F.2d 1061, 1064, fn. 2 (5th Cir. 1987).

Therefore, Pacific Lighting's failure to have objected at trial requires denial of its petition.

D. There Is No Jurisdiction To Consider Any Issue Not Raised In The Court Of Appeal.

Pacific Lightings' effort to present to this Court any issue other than the "ceiling" argument it presented to the Court of Appeal raises a jurisdictional defect as well. It simply is not allowable for a litigant to raise one Due Process argument in state court[22], and then

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[22] Pacific Lighting also apparently contends, despite Board of Dirs. of Rotary Inter. v. Rotary Club, 107 S. Ct. 1940, 1948, fn. 9 (1987) to the contrary, that its petition for discretionary review to the California Supreme Court could preserve new issues even though its petition was denied.

For this startling proposition, Pacific Lighting again relies on unstated premises that are simply unsupportable. First, Pacific Lighting contends that California appellate procedure did not require it to assert those issues prior to a petition for discretionary review to the California Supreme Court, despite clear California case law to the contrary. Estate of Leslie, 37 Cal. 3d 186, 202, 207 Cal. Rptr. 561, 689 P. 2d 133 (1984); Franz v. Board of Medical Quality Assurance, 31 Cal. 3d 124, 143, 181 Cal. Rptr. 732, 642 P. 2d 792 (1982); Imperial Valley L. Co. v. Globe G. & M. Co., 187 Cal. 352, 359, 202 P. 129 (1921); CNA Casualty of California v. Seaboard Surety Company, 176 Cal. App. 3d 598, 618, 222 Cal. Rptr. 276 (1986).

In order to overcome the ordinary rules of appellate procedure, Pacific Lighting argues that a new rule, overruling sub silentio decades of California cases, was announced in a footnote in Moradi-Shalal v. Fireman's Fund Insurance Companies, 46 Cal. 3d 287, 250 Cal. Rptr. 116, 758 P. 2d 58 (1988). In that case, the California Supreme Court did consider an issue that had not been squarely raised where that issue was necessary for proper resolution of the issue that had been properly raised, and where overruling of one of its past decisions was required.

Moradi-Shalal does not purport to establish a new rule. To the contrary, Moradi-Shalal simply follows the California rule that an appellate court can in its discretion waive non-preservation of an issue if the matter "presents a pure question of law on undisputed evidence regarding either a noncurable defect of substance, such as a lack of jurisdiction or complete failure to state a cause of action, or a matter affecting the public interest or the due administration of justice." CNA Casualty of California v. Seaboard Surety Company, 176 Cal. App. 3d 598, 618, 222 Cal. Rptr. 276 (1986). However, there is no such waiver here. (In fact, any such waiver would conflict with another rule of California appellate procedure, that constitutional issues are waived if not raised at the earliest opportunity. In re Marriage of Benjamin S., 171 Cal. App. 3d 738, 745, 217 Cal. Rptr. 561 (1985); Selleck v. Globe International, 166 Cal. App. 3d 1123, 1133, 212 Cal. Rptr. 838 (1985); Geftakys v. State Personnel Bd., 138 Cal. App. 3d 844, 864, 188 Cal. Rptr. 305 (1982) ["It is the general rule applicable in civil cases that a constitutional question must be raised at the earliest opportunity or it will be considered as waived."].

Be that as it may, Pacific Lighting next asserts that it falls within the new rule of Moradi-Shalal since the issues it raises here would have required overruling of Bertero v. Nation General Corp., 13 Cal. 3d 43, 118 Cal. Rptr. 184, 529 P.2d 608 (1974). In fact, the decision in Bertero is not nearly as broad as Pacific Lighting assert. While a footnote (Id. at 66, n.13) in Bertero does reject a "constitutional" attack on the California punitive damage statute, the opinion (1) does not indicate whether the "constitutional" issue is based on the California or Federal constitution, (2) is limited to a vagueness challenge, and (3) challenged a statute very different in form from the substantially amended statute in issue in this case. (For example, one of the main claims of Pacific Lighting is that the instruction that the jury must find "despicable" conduct is too vague to satisfy Due Process. (Petition For Certiorari, p. 10) That instruction, however, was mandated by the recent California Tort Reform Act, and was not contained in any of the jury instructions that were before the California courts in Bertero.)

That Bertero is limited in scope is demonstrated by Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981). There, the Court considered a contention that the lack of "fair warning" that the defendant's conduct would subject it to punitive damages violated due process. (Pacific Lighting likewise asserts that it had no warning that its conduct could be subjected to punitive damages because the case arose from contract, in which punitive damages are unavailable. Petition, p. 8-9.) The defendant in Grimshaw lost not because such an argument was

make a very different Due Process argument here. This Court has long required that the issues presented here have been *squarely* presented to the court below, particularly where the litigant seeks to overturn, rather than support, the judgment. Browning-Ferris Industries v. Kelco, ___ U.S. ___, 109 S. Ct. 2909, 2921, fn. 23. (1989); Bankers Life and Cas. Co. v. Crenshaw, ___ U.S. ___, 108 S. Ct. 1645, 1649-50 (1988).

E. Pacific Lighting's Contention Constitutes An Impermissible Facial Attack On The California Scheme.

Pacific Lighting's federal claim constitutes a facial attack on the California scheme for imposing punitive damages. Pacific Lighting does *not* argue that the *actual* amount of punitive damages assessed against *it* is

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unavailable, but because the Court found that the defendant in fact had fair warning from California case law predating the conduct.

Therefore, even if Moradi-Shalal is the revolution in California appellate procedure that Pacific Lighting believe it to be, since the Bertero footnote does not completely resolve all due process issues, it fails to provide the underpinning that Pacific Lighting requires.

In addition, Bertero predates Bankers Life and Browning-Ferris. There can be no certainty that, in light of the statements by various members of this Court, California appellate courts would not have expanded due process protections, or expanded the common law protections in order to avoid the constitutional question.

Finally, whether Moradi-Shalal establishes a new rule is irrelevant here. This Court requires that the issue have been preserved below. If the California Supreme Court had granted review to Pacific Lighting and decided the additional due process arguments, jurisdiction might well exist here to consider them. But it did not. This Court's practice recognizes that where a lower court considers an issue advanced by a party in the face of valid procedural rules, the issue may be pressed here. But where the lower courts have not waived compliance with their own rules, review here is barred. Beecher v. Alabama, 389 U.S. 35, 37 (1967) ["In any event, since the state court deemed the federal constitutional question to be before it, we could not treat the decision below as resting upon an adequate and independent state ground even if we were to conclude that the state court might properly have relied upon such a ground to avoid deciding the federal question"], State v. Brand, 303 U.S. 95, 99 (1938).

violative of Due Process.[23] In essence, its argument is: Even though I have no cause for complaint, since someone else might have, the award against me cannot stand.[24] Such arguments are routinely rejected by the Court.

In Broadrick v. Oklahoma, 413 U.S. 601 (1973), the Court stated the general rule against litigants making facial attacks of unconstitutionality when they themselves have no cause for complaint, though others might:

> Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court. [Citations.] A closely related principle is that constitutional rights are personal and may not be asserted vicariously. These principles rest on more than the fussiness of judges. They reflect the conviction that under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws. Constitutional judgments, as Mr. Chief Justice Marshall recognized, are justified only out of the necessity of adjudicating rights in particular cases.... Id. at 610-11

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[23] This is hardly surprising, given that the punitive damage awards are not in any sense disproportional to the actual damages assessed. It is, nevertheless, fatal to Pacific Lighting's claim.

[24] Assumedly, every California litigant assessed punitive damages is likewise entitled to avoid them irrespective of the size of the award or the facts of the case.

See also, Caplin & Drysdale, Chartered v. U.S., 109 S. Ct. 2646, 2657 (1989) [the fact that the statute in issue *could* be abused in some other case did not allow the appellant to assert the issue], Bd. of Trustees of State Univ. of N.Y. v. Fox, ___ U.S. ___, 109 S. Ct. 3028, 3037 (1989), Bankers Life and Cas. Co. v. Crenshaw, 486 U.S. 71 at fn. 6 (1988).[25]

F. Even If The Merits Were Reached, Pacific Lighting's Case Is Weak.

1. Pacific Lighting's contention that Due Process requires a ceiling or limit on the amount that can be assessed is meritless.

Pacific Lighting argues that the award against it cannot stand because there was no ceiling on the amount that could be assessed against it. This argument is meritless.

The contention of petitioners *has* been passed upon by this Court. In Standard Oil Co. v. Missouri, 224 U.S. 270 (1912), Standard Oil contended that the civil penalty imposed upon it denied it Due Process "because there was no statute fixing a maximum penalty..." [Emphasis added.] Id. at 285. This Court rejected the contention since the penalty could be upheld on the theory of punitive damages. And in Louis Pizitz Dry Goods Co. v. Yeldell, 272 U.S. 112 (1927), this Court approved the constitutionality of a punitive damage award without a limit set in advance where the only protection was that the "finding of the jury is not to be

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[25] In Bankers Life, appellant argued that the imposition of a surcharge upon the amount of a judgment if unsuccessfully appealed would burden the access of litigants to the courts in violation of equal protection. The court noted that such a claim might well have merit as to others, but that since the appellant in the case before it had not demonstrated that its access to appeal had been foreclosed it had no standing to assert the issue.

disturbed unless the verdict is 'induced or reached on account of prejudice, passion, or other improper motive or cause.'" Id. at 114-5. These cases dispose of Pacific Lighting's ceiling contention.

Pacific Lighting's contention also ignores California common law developments in this area. For example, in People ex rel. Dept. of Transportation v. Grocers Wholesale Co., 214 Cal. App. 3d 498, 262 Cal. Rptr. 689 (1989), the California Court of Appeal surveyed punitive damages cases[26] and noted that generally such awards should not exceed 10% of the defendant's net worth absent unusual or egregious circumstances.[27]

2. Any conceivable error was harmless in any event.

Pacific Lighting's concern about the jury's possible imposition of "any amount of punitive damages, no matter how outrageous" was satisfied by MGW's request in closing argument for an assessment of $3,000,000 against all of the defendants. RT 1434/10-13. In light of the amounts requested, any failure to have a maximum specified by the Court in advance was

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[26] See, Burnett v. National Enquirer, Inc., 144 Cal. App. 3d 991, 1011-12, 193 Cal. Rptr. 206, 218-19 (1983) [award equalling 29% of net worth excessive; reduced to 5.77% of net worth]; Little v. Stuyvesant Life Ins. Co., 67 Cal. App. 3d 451, 469-70, 136 Cal. Rptr. 653, 663-64 (1977) [award equalling 15% of net worth excessive; reduced to 1.5% of net worth]; Merlo v. Standard Life & Acc. Ins. Co., 59 Cal. App. 3d 5, 18, 130 Cal. Rptr. 416, 424 (1976) [award exceeding 30% of net worth excessive].

[27] Petitioners may argue that 10% of net worth is not enough protection since it sets no fixed limit. However, such a limit is enough to meet the requirement of due process. Alternative limits present greater problems than the one California applies. For example, a fixed multiple of actual damages (e.g., treble damages) would provide little notice of the defendant's exposure unless the actual damages are liquidated in advance, rarely the case in tort actions. A fixed dollar limit (e.g., $10,000) is in no way tailored to the individual wrongdoer. While a $10,000 award may be disastrous for a relatively poor defendant, it is meaningless to a large corporation.

harmless error since the defendants already had such a maximum. This case is similar to Bratt v. Western Air Lines, 169 F.2d 214, 216-7 (10th Cir. 1948). There, an instruction given concerning negligence was erroneous. However, the Court found that in light of the concessions made in plaintiff's closing statement, there was little likelihood that the instruction had affected the result. Accordingly, the judgment was affirmed.

3. Since the California punitive damage scheme comports with accepted common law principles concerning punitive damages at the time of the adoption of the Fourteenth Amendment, it is immune from Constitutional attack.

Burnham v. Superior Court of Cal., ___ U.S. ___, 110 S. Ct. 2105, 2115 (1990), presents another formidable obstacle to Pacific Lighting's attempt to obtain reversal of the judgment against them. In that case, a plurality[28] decision stated that, "'[A] process of law, which is not otherwise forbidden, must be taken to be due process of law, if it can show the sanction of settled usage both in England and in this country...'[quoting Hurtado v. California, 110 U.S. 516, 528-9, 28 L.Ed. 232, 4 S. Ct. 111 (1884)].

Punitive damages certainly were accepted law during the period in which the Due Process clause was adopted. Day v. Woodworth, 54 U.S. 363, 371 (1851). See, Smith v. Wade, 461 U.S. 30 (1983), Barry v. Edmunds, 116 U.S. 550 (1886), and therefore do not violate Due Process.

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28 Justice Scalia authored the opinion, and was joined by Justices Rehnquist and Kennedy. Justice White joined the opinion with respect to the portions of the opinion discussed below.

V. CONCLUSION.

This Court's job is hard enough deciding issues on their merits. In light of the serious jurisdictional and procedural problems here, there is simply nothing attractive about the prospect of addressing Due Process issues in this case. There is no unfairness to the petitioners, who have only themselves to blame for their failure to preserve a clean record.

This case is pregnant with those procedural shortcomings (lack of an objection at trial, lack of a record disclosing the functioning of the state system under attack, lack of considered and thorough state appellate court consideration) that present only broad, theoretical questions, rather than narrowly focused issues ripe for adjudication.

This case should be put into perspective. A trial was conducted in Orange County, California. At that trial, *no one* even hinted that the punitive damage instruction given in any way violated Due Process. Oblivious to any such concern, the case went to the jury and petitioners lost. Petitioners then had the right to seek a reduction in the punitive damage award from the trial judge, but for reasons known only to themselves declined to do so. Having failed at trial in any way to assert or preserve the Due Process issue complained of here, petitioners now come petition in hand to this Court. Neither equity nor prudence can justify disturbing the award at this stage.

Respectfully submitted,

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No. 90-626

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

PACIFIC LIGHTING CORPORATION,
FREDRICKS DEVELOPMENT CORPORATION, and
DUNN PROPERTIES CORPORATION,

Petitioners,

v.

MGW, INC.,

Respondent.

REPLY MEMORANDUM

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IN THE

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OCTOBER TERM, 1990

No. 90-626

PACIFIC LIGHTING CORPORATION,
FREDRICKS DEVELOPMENT CORPORATION, and
DUNN PROPERTIES CORPORATION,

Petitioners,

v.

MGW, INC.,

Respondent.

REPLY MEMORANDUM

In the Petition, Pacific Lighting Corporation ("Pacific Lighting"), Fredricks Development Corporation ("Fredricks") and Dunn Properties Corporation ("Dunn"), demonstrated that the California punitive damage system is a manifestly standardless and random regime that inflicts monetary punishments in unpredictable, inconsistent and excessive amounts against similarly situated defendants. Although the California Court of Appeal in this case expressly and unequivocally rejected the argument that such state-imposed punishments violate the Due Process Clause of the Fourteenth Amendment, citing previous California decisions rejecting a full range of due process challenges to punitive damages, Pet. App. 12a, respondent's Brief in Opposition nonetheless unaccountably argues at length that this Court lacks jurisdiction to review the federal question presented in the Petition. Opp. at 4-27. Respondent also

attempts to distinguish this case from *Pacific Mutual Life Insurance Co.* v. *Haslip*, No. 89-1279 (argued Oct. 3, 1990), despite the fact that the Court of Appeal expressly referred to the grant by this Court of certiorari in *Pacific Mutual* in rejecting the due process challenges below. Respondent argues on the merits that California law contains standards that sufficiently limit the discretion of juries to impose punitive damages, and that historical acceptance of these standards insulates them from attack under the Due Process Clause. Petitioners will address each of these arguments in turn.

1. As discussed in the Petition, at 5-6, petitioner Pacific Lighting argued in the California Court of Appeal that the imposition of "unlimited" punitive damages in this case by an "uncontrolled" jury pursuant to "unspecified, nebulous, and ultimately meaningless" standards violated "concepts of fair play and justice embodied in the Due Process Clause . . . ." Pet. App. at 18a-21a. Relying upon California decisions discussing various due process objections to punitive damages,[1] the Court of Appeal rejected that argument, concluding that "punitive damages are constitutional under . . . . the due process provisions of the Fourteenth Amendment." Pet. App. 12a. The Court of Appeal also explicitly acknowledged that this Court had granted the petition for certiorari in *Pacific Mutual Life Insurance Co.* v. *Haslip*, No. 89-1279 (argued Oct. 3, 1990), which presents due process challenges to the vague standards governing punitive damages in Alabama and the excessiveness of the award in that case. Pet. App. at 21a.[2]

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[1] These cases, *Bertero* v. *National General Corp.*, 13 Cal. 3d 43, 529 P.2d 608, 118 Cal. Rptr. 184 (1974), and *Zhadan* v. *Downtown L.A. Motors*, 66 Cal. App. 3d 481, 136 Cal. Rptr. 132 (1976), challenged both the vagueness of standards for determining liability for punitive damages and for determining the amount of the award. *See* Pet. at 6 & n.4.

[2] After its citation to the California cases rejecting due process challenges to punitive damages, the court below added a "*but see*" citation to this Court's order granting review of *Pacific Mutual*. Pet. App. at 12a.

All three petitioners reiterated these due process objections to the punitive damage award in the Supreme Court of California, and argued that this case presents the same federal constitutional challenges to punitive damages as *Pacific Mutual*. The Supreme Court of California denied review.[3]

It is well settled that "[t]here can be no question as to the proper presentation of a federal claim when the [court below] passes on it." *Raley v. Ohio*, 360 U.S. 423, 436 (1959). Respondent thus concedes, as it must, jurisdiction with respect to petitioner Pacific Lighting. Opp. at 3-4, 12. Respondent, however, attempts to characterize narrowly the due process question as dealing with "one limited issue"—whether "the California scheme for assessment of punitive damages violates Due Process *because it does not set a ceiling in advance on the amount of punitive damages that can be assessed.*" Opp. at 3-4 (emphasis in original).

As discussed above and in detail in the Petition, Pacific Lighting's due process arguments in the Court of Appeal challenged the jury's " 'wholly standardless discretion' "[4] to inflict punishment in this case and the resulting lack of "fair play and justice . . . . " Pet. App. at 19a-21a. Pacific Lighting thus objected not just to "ceilingless" punitive damages but to the complete lack of any objective standards or guidelines affording advance notice to defendants of the potential magnitude of the punishment

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[3] The California Supreme Court recently denied review in another case involving "tortious interference with business relations" in which the California Court of Appeal expressly rejected federal due process objections to an $8,500,000 punitive damage award in an "unpublished opinion." *See Hilgedick* v. *Koehring Finance Corp.*, No. A039723 (Cal. Ct. App. Aug. 30, 1990).

[4] Pet. App. at 18a-19a, *quoting Bankers Life and Casualty Co.* v. *Crenshaw*, 486 U.S. 71, 88 (1988) (O'Connor, J., concurring).

for engaging in specifically defined conduct. *See* Pet. App. at 20a & n.9.

The Court of Appeal's citation to California cases rejecting similar "vagueness" challenges to punitive damages, as well as its citation to *Pacific Mutual*, make clear that the court correctly understood Pacific Lighting's due process objections to be directed at all aspects of the standardless California punitive damage regime and the arbitrary award that it produced in this case. The Court of Appeal's holding that "punitive damages are constitutional" under the Due Process Clause sweepingly disposed of these arguments.

To the extent that petitioners have refined and supplemented their due process arguments or articulated the due process question with greater specificity in this Court, it is well settled that the "[p]arties are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discussed." *Dewey* v. *Des Moines*, 173 U.S. 193, 197-198 (1899); *e.g.*, *Stanley* v. *Illinois*, 405 U.S. 645, 658 & n.10 (1972) (although the precise issue was not raised in the courts below, the issue could be considered in this Court because it involved the same "constitutional premise raised below" and the "method of analysis [was] readily available to the state court"); *see also Pruneyard Shopping Center* v. *Robins*, 447 U.S. 74, 85-86 n.9 (1980); *Illinois* v. *Gates*, 462 U.S. 213, 248 & n.2 (1983) (White, J., concurring in the judgment) ("We have never suggested that the jurisdictional stipulations of § 1257 require that all arguments on behalf of . . . a federal claim be raised and decided below."). Therefore, respondent's complaint that the Petition advances due process arguments that are "different" than those made below (Opp. at 25) must be rejected.

2. Respondent also contends that "[t]here is simply no jurisdiction" vested in this Court to review the portion of the $2,000,000 punitive damage award allocated by the

jury to petitioners Fredricks and Dunn because they raised their federal due process claims for the first time in the Supreme Court of California. *See* Pet. at 5 n.3. But that fact is simply irrelevant to this Court's jurisdiction given that the Court of Appeal expressly addressed and rejected the federal question presented in the Petition, and the Court therefore need not even inquire into the manner of presentation. *See, e.g., Orr* v. *Orr*, 440 U.S. 268, 274-75 (1979) (" 'it is irrelevant to inquire . . . when a Federal question was raised in a court below when it appears that such question was actually considered and decided' ") (citation omitted); *Payton* v. *New York*, 445 U.S. 573, 582 n.19 (1980) (because the court below decided the constitutional issue, "there is no doubt that it is properly presented for review by this Court"); *Raley*, 360 U.S., at 436.

Thus, for example, in *Jenkins* v. *Georgia*, 418 U.S. 153, 157 (1974), the appellee argued that a federal constitutional question was not properly before the Court "because appellant did not raise it on his state appeal." This Court rejected that argument, concluding that "whether or not appellant argued this constitutional issue below, it is clear that the Supreme Court of Georgia reached and decided it. That is sufficient under our practice." *Id.*, at 157. Therefore, under cases like *Jenkins*, even if *none* of the parties raise a federal question in state court, but the court below nonetheless decides it, this Court indisputably has jurisdiction.

3. Respondent urges this Court to deny review of this case because "there is nothing about . . . [the] petition that can commend itself to this Court." Opp. at 12. In particular, respondent argues that the case at bar is "very different" from *Pacific Mutual Life Insurance Co.* v. *Haslip*, No. 89-1279 (argued Oct. 3, 1989), and that therefore "[n]othing that could result from that case will be dispositive here." Opp. at 12.

Respondent's assertion that this case differs from *Pacific Mutual* is relevant in a manner that respondent may not fully comprehend. The respondents in *Pacific Mutual* have argued that the specific facts and the underlying record in that case make it an inappropriate vehicle for consideration of the question whether the standardless imposition of punitive damages violates the Due Process Clause.[5] Due to the undifferentiated verdict in *Pacific Mutual*, it has become a matter of controversy what portion of the verdict, if any, constitutes punitive, rather than compensatory, damages.[6] By contrast, there is no question that the jury in this case inflicted a $2,000,000 award that was *purely* punitive.[7] Thus, to the extent this case differs from *Pacific Mutual*, it differs in a way that makes it a much better case in which to review the question whether punitive damages violate the Due Process Clause.[8]

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[5] *See* Resps. Br. in Opp. at 7-10.

[6] *See* Petitioner's Letter Brief (filed Oct. 29, 1990); Response to Petitioner's Post-Argument Letter Brief and Post-Argument Brief of Respondents (filed Nov. 6, 1990). In response to questions regarding the breakdown of compensatory and punitive damages, counsel for Pacific Mutual suggested during oral argument that the punitive portion of the verdict could be calculated by subtracting the amount of compensatory damages requested in the complaint from the total verdict, and agreed to provide the Court with citations to Alabama cases that precluded juries from awarding compensatory damages in an amount that exceeds the prayer. Tr. at 4-6.

In its post-argument submission, Pacific Mutual appears to acknowledge that Alabama law permits juries to award compensatory damages in excess of the amounts prayed for in the complaint. Letter Br. at 3-5. The respondents have accordingly urged that it is not possible to calculate the amount of the punitive portion of the verdict in *Pacific Mutual* simply by subtracting the requested amount of compensatory damages from the total verdict.

[7] Similarly, there is no dispute that the $500,000 punitive damage award in *Reserve Life Insurance Co.* v. *Eichenseer*, *cert. pending* (No. 89-1303), was inflicted solely to punish.

[8] This Court has dismissed cases as improvidently granted where the briefs and oral argument reveal facts that "sufficiently cloud[ ] the record

4. Respondent also contends that petitioners' due process claims are "meritless" because they ignore recent "California common law developments" that purportedly limit the discretion of juries to impose punitive damages. Opp. at 28. As an example of these developments, respondent points to *People ex rel. Department of Transportation* v. *Grocers Wholesale Co.*, 214 Cal. App. 3d 498, 262 Cal. Rptr. 689 (1989), and asserts that that case establishes a rule that punitive damage "awards should not exceed 10% of the defendant's net worth absent unusual or egregious circumstances." Opp. at 28. However, not even such an extremely broad and elastic "rule" can be extracted from *Grocers Wholesale* or any other California case. Indeed, the California Court of Appeal in *Grocers Wholesale* expressly acknowledged that "calculation of punitive damages is a 'fluid process' that 'does not involve strict adherence to a rigid formula' . . . . " 214 Cal. App., at 515.[9] Recent California punitive damage verdicts con-

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to render the case an inappropriate vehicle" for the Court to decide a federal question. *Jones* v. *Board of Education*, 397 U.S. 31, 32 (1970) (per curiam); *e.g.*, *Odom* v. *United States*, 400 U.S. 23 (1970) (per curiam); *Moon* v. *Maryland*, 398 U.S. 319 (1970) (per curiam); *Wainwright* v. *City of New Orleans*, 392 U.S. 598, 599 (1968) (Fortas, J., concurring) ("Upon oral argument and further study after the writ was granted, it became apparent that the facts necessary for evaluation of the dispositive constitutional issues . . . are not adequately presented by the record before us."); *see generally Rice* v. *Sioux City Memorial Park Cemetery*, 349 U.S. 70, 78-79 & n.2 (1955), *and cases cited*. If the Court does so in *Pacific Mutual*, it should grant the Petition in this case or one of the other pending cases that clearly present due process challenges to a punitive damage judgment.

[9] The *Grocers Wholesale* court relied upon *Devlin* v. *Kearney Mesa AMC/Jeep/Renault, Inc.*, 155 Cal. App. 3d 381, 202 Cal. Rptr. 204 (1984), which is discussed in the Petition, at 9-10, and which expressly concluded that a "formula does not exist" for calculating punitive damages. 155 Cal. App. 3d, at 388. Instead, it is "to put it mildly an unscientific process," that depends upon the individual jurors' "background, temperament and societal concerns," and is "further complicated by the lack of objective criteria . . . as to 'how much' is necessary to punish and deter." *Id. See also Gagnon* v. *Continental Casualty Co.*, 211 Cal. App. 3d 1598, 1604, 260 Cal. Rptr.

firm that the wealth of the defendant does little to restrain the unlimited discretion of juries to punish. *E.g., Greenwood & Company Real Estate Co.* v. *C-D Investment Co.*, No. C 523-923 (Super. Ct., Los Angeles Co., Cal. March 5, 1990) (imposing $5,000,000 punitive damage award against one individual defendant, amounting to 1000% of defendant's net worth, and $4,000,000 punitive damage award against another individual defendant, amounting to 1400% of defendant's net worth in "tortious interference" case involving real estate sales commission dispute) (notice of appeal filed).

In addition, respondent points to the 1987 amendments to California's punitive damage statute, *Cal. Civ. Code* § 3294, and suggests that it added significant "protections" that cure any due process defects of the system. Opp. at 2, 17-20. That legislation, however, did nothing to improve the system. Instead, it added new and highly subjective terms like "despicable" to describe the conduct that can form the basis of liability for punitive damages. This Court has in other contexts condemned similarly "loose and unlimiting" standards for imposing punishment. *See Giacco* v. *Pennsylvania*, 382 U.S. 399, 403 (1966). Furthermore, the California legislature in 1987 did not include *any* limits or standards in the statute for determining the amount of punitive damages in a particular case.

5. Finally, respondent argues that because punitive damages existed at the time the Fourteenth Amendment was adopted, the current punitive damage system cannot be challenged under the Due Process Clause. Opp. at 29. But the imposition of unlimited punishment in the form of pu-

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305 (1989) ("the case law strongly suggests that a ratio in and of itself has little inherent meaning .... In the final analysis, therefore, the propriety and amount of punitive damages *depends entirely upon the facts of a case.*") (emphasis added); *Wetherbee* v. *United Insurance Co.*, 18 Cal. App. 3d 266, 271, 95 Cal. Rptr. 678 (1971) ("there is no fixed ratio ... the factors influencing the amount of the exemplary damages can only be disclosed by the trial record.").

nitive damages is an anomaly in our jurisprudence that did not emerge until the latter part of the Nineteenth Century.[10] The practice was sharply and immediately criticized by many courts. *See, e.g., Fay* v. *Parker*, 53 N.H. 342, 382 (1872) ("The idea of [punitive damages] is wrong. It is a monstrous heresy. It is an unsightly and an unhealthy excrescence, deforming the symmetry of the body of the law."). *See also Smith* v. *Wade*, 461 U.S. 30, 58 (1983) (Rehnquist, J., dissenting) ("the doctrine of punitive damages has been vigorously criticized throughout the Nation's history").

The doctrine of punitive damages has gone through a radical transformation in the last two decades, frequently and randomly producing "skyrocketing" awards. *See Browning-Ferris Industries of Vermont, Inc.* v. *Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2924 (1989) (O'Connor, J., concurring and dissenting).[11] The modern punitive damage system is the product of a gradual and " 'unconstitutional assumption of powers by the [courts] which no lapse of time or respectable array of opinion should make [the Court] hesitate to correct.' " *Bloom* v. *Illinois*, 391 U.S. 194, 198 (1968) (citation omitted). *See also Williams* v. *Illinois*, 399 U.S. 235, 239 (1970) ("neither the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack").

Certiorari should be granted and this case set for plenary consideration.

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[10] By the time the Fourteenth Amendment was ratified, the States had universally rejected the concept of unlimited punishment and enacted comprehensive criminal codes defining substantive criminal offenses and establishing specific ranges of punishments for those offenses. *See* Brief *Amici Curiae* of Aetna Life Insurance Company, *et al.*, at 12-16, in *Pacific Mutual.*

[11] *See* Brief *Amici Curiae* of American Institute of Architects, *et al.*, at 6-27, in *Pacific Mutual.*

November 27, 1990

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

PACIFIC LIGHTING CORPORATION, FREDRICKS DEVELOPMENT CORPORATION, and DUNN PROPERTIES CORPORATION,

Petitioners,

v.

MGW, INC.,

Respondent.

SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT

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I. INTRODUCTION.

This supplemental brief is being filed to address the proper disposition of the due process challenge raised by petitioners in light of this Court's recent decision in *Pacific Mutual Life Ins. Co. v. Haslip*, _____ U.S. _____ (1991). Under the *Haslip* decision, the petition for *certiorari* must be denied.

II. ARGUMENT.

A. The California Scheme Meets The Requirements Of Due Process As Set Forth In *Haslip*.

The California scheme under attack here provides numerous protections to defendants in punitive damage cases, far more than are required under *Pacific Mutual Life Ins. Co. v. Haslip*, _____ U.S. _____ (1991). Those protections can be summarized as follows:

(1) At trial, the jury is instructed[1] that it

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[1] The jury was instructed:

If you find that MGW suffered damage as a proximate result of any of the defendants' conduct on which you base a finding of liability, you may then consider whether you should award punitive damages against that defendant, or those defendants, for the sake of example and by way of punishment. You may in your discretion award such damages if, but only if, you find by *clear and convincing evidence* that said defendant was guilty of *fraud or malice* in the conduct on which you base your finding of liability.

Malice means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a

may assess punitive damages only where it finds the defendant guilty of certain offenses.

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willful and conscious disregard of the rights of others.

A person acts with conscious disregard of the rights of others when it is aware of the probable economic consequences of its conduct and willfully and deliberately fails to avoid those consequences.

"Despicable conduct" is conduct which is so vile, base, contemptible, miserable, wretched or loathsome that it would be looked down upon by ordinary decent people.

Fraud means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal right or otherwise causing injury.

The law provides no fixed standards as to the amount of such punitive damages, but leaves the amount to the jury's sound discretion, exercised without passion or prejudice.

In arriving at any award of punitive damages, you are to consider the following: *1. The reprehensibility of the conduct of the defendant; 2. The amount of punitive damages which will have a deterrent effect on the defendant in the light of defendant's financial condition; 3. That the punitive damages must bear a reasonable relation to the actual damages.*

If you find that MGW is entitled to an award of punitive damages against defendant, you shall state the amount of punitive damages separately in your verdict. CT 876-7. [Emphasis added.]

(2) The jury must also find a mental element, "malice, fraud, or oppression", which are defined to the jury and which involve conscious wrongdoing.

(3) The jury may only assess punitive damages upon proof by *clear and convincing evidence.*

(5) The jury is instructed that the amount of punitive damages must bear a reasonable relationship to actual harm.

(6) The jury is instructed that the damages should be of an amount sufficient to deter and punish.

(7) After the verdict, the jury award is reviewed by the judge, sitting as a thirteenth juror, who must reduce the award if, in his "independent judgment", it is excessive.[2]

(8) On appeal, the award again is reviewed for excessiveness. *See, e.g., People v. Grocers Wholesale Co.*, 214 Cal. App. 3d 498, 514, 262 Cal. Rptr. 689, 699 (1989); *Dumas v. Stockter*, 213 Cal. App. 3d 1262, 262 Cal. Rptr. 311, 314 (1989); *Wollersheim v. Church of Scientology*, 212 Cal. App. 3d 872, 906, 260 Cal. Rptr. 331, 353 (1989), *cert. denied* 110 S. Ct. 1937; *Kaye v.*

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[2] "[T]he trial court, in ruling on the [new trial] motion, sits not in an appellate capacity but as an independent trier of fact." *Neal v. Farmers Ins. Exch.*, 21 Cal. 3d 910, 933, 148 Cal. Rptr. 389, 402, 582 P.2d 980 (1978). California Code of Civil Procedure section 662.5 provides for the trial court to issue a remittitur "of so much [of the verdict] as the court in its *independent judgment* determines from the evidence to be fair and reasonable".

In *Neal*, the trial court's reduction of a punitive damage award was upheld.

Mount La Jolla Homeowners Ass'n., 204 Cal. App. 3d 1476, 1492-93, 252 Cal. Rptr. 67, 77 (1988).

These protections satisfy the requirements of due process under *Haslip*. There, the jury instruction on punitive damages offered much less guidance than the instruction in this case.[3] Here, by contrast, the instruction not only informed the jury of the purpose of punitive damages (in terms similar to those approved in *Haslip*), but provided additional guidance as to the mental culpability of the defendant, requires clear and convincing evidence, and that the award must bear a reasonable relationship to actual harm.

After the award, under California law, the defendant has the right to seek review by the trial judge of the amount of the award. The trial judge's review is *not* a rubber-stamp review according a high level of deference to the jury's verdict. Rather, the judge must reduce the award if, in his "independent judgment", it is excessive.

Nor does the amount of the punitive damage award in this case raise due process concerns. The actual damages awarded in this case are $773,200.00. The punitive damages assessed against Pacific Lighting and Dunn Properties, $800,000 each, are only slightly higher than the actual damages. The award against Fredricks Development, $400,000, was much less that the actual damages. The total punitive damage award

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[3] That instruction stated, in relevant part: "Now, the purpose of awarding punitive or exemplary damages is to allow money recovery to the plaintiffs, it does to the plaintiff, by way of punishment to the defendant and for the added purpose of protecting the public by detering [sic] the defendant and others from doing such wrong in the future. Imposition of punitive damages is entirely discretionary with the jury, that means you don't have to award it unless this jury feels that you should do so."

was less than three times the actual damages. In *Haslip*, the punitive damage award was "more than 4 times the amount of compensatory damages, is more than 200 times the out-of-pocket expenses...".

It bears noting that not only does this case fall squarely within the due process requirements enunciated by the majority in *Haslip*, it also meets the standards of Justice O'Connor, the lone dissenter. Justice O'Connor noted with approval the "Green Oil factors"[4] used by Alabama courts to review a jury

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[4] Those factors are:

"(1) Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. If the actual or likely harm is slight, the damages should be relatively small. If grievous, the damages should be much greater.

(2) The degree of reprehensibility of the defendant's conduct should be considered. The duration of this conduct, the degree of the defendant's awareness of any hazard which his conduct has caused or is likely to cause, and any concealment or "cover-up" of that hazard, and the existence and frequency of similar past conduct should all be relevant in determining this degree of reprehensibility.

(3) If the wrongful conduct was profitable to the defendant, the punitive damages should remove the profit and should be in excess of the profit, so that the defendant recognizes a loss.

(4) The financial position of the defendant would be relevant.

(5) All the costs of litigation should be

award of punitive damages, and indicated that a jury instruction patterned after those factors would satisfy due process. ["The Alabama Supreme Court has already given its approval to the Green Oil factors. By giving these factors to juries, the State would be providing them with some specific standards to guide their discretion....Other procedural safeguards might prove equally effective." *Pacific Mutual Life Ins. Co. v. Haslip*,_____ U.S. _____ (1991) (O'Connor, J., dissenting).

Justice O'Connor also noted that other procedural safeguards, for example requiring proof by clear and convincing evidence, are available. Finally, she concluded:

> Given the existence of several equally acceptable methods, concerns of federalism and judicial restraint counsel that this Court should not legislate to the States which particular method to adopt. I would thus leave it to individual States to decide what method is most consistent with their objectives....
>
> [W]e need not dictate to the states the precise manner in which they must

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included, so as to encourage plaintiffs to bring wrongdoers to trial.

(6) If criminal sanctions have been imposed on the defendant for his conduct, this should be taken into account in mitigation of the punitive damages award.

(7) If there have been other civil actions against the same defendant, based on the same conduct, this should be taken into account in mitigation of the punitive damages award." *Pacific Mutual Life Ins. Co. v. Haslip*,_____ U.S. _____ (1991) (O'Connor, J., dissenting).

address the problem. We should permit the States to experiment with different methods and to adjust these methods over time.

The California jury instruction combined with the requirement of proof by clear and convincing evidence satisfies even Justice O'Connor's due process requirements.

B. No Reason Exists To Vacate And Remand In This Case.

Remand of a case for further consideration in light of new United States Supreme Court decision is warranted only where there is reason to believe that the result reached by the lower court "might have been different" if the new precedent had been available to it. *See Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24, 25-6 (1978) (Stevens, J., dissenting) There is no basis to believe that to be the case here.

The California Court of Appeals in this case addressed and rejected the challenge to due process.[5]

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[5] The Court of Appeal opinion stated:

> Finally, it argues the award of punitive damages is supported by insufficient evidence, and punitive damages are unconstitutional. However, there is sufficient evidence in the record to support the award, and punitive damages are constitutional under the Eighth Amendment (*Browning-Ferris v. Kelco Disposal*, 109 S. Ct. 2909, 2912 (1989)), and the due process provision of the Fourteenth Amendment (*Bertero v. National General Corp.*, 13 Cal. 3d 43, 66, fn. 13 (1974); *Zhadan v. Downtown L.A.*

Constitutional attacks on the punitive damage scheme in California have been rejected by the California Supreme Court and Court of Appeal. *Bertero v. National General Corp.*, 13 Cal. 3d 43, 66, fn. 13 (1974); *Zhadan v. Downtown L.A. Motors*, 66 Cal. App. 3d 481, 501-502 (1976).

For these reasons, remand of the case for reconsideration in light of *Haslip* is not appropriate.

III. CONCLUSION.

In this case, the jury instruction informed the jury, among other things, that its assessment of punitive damages should be based upon the goals of punishment and deterrence in terms which, for all intents and purposes, were identical to those approved in *Haslip*. The amount of the award was less than the 4 to 1 ratio approved in *Haslip*. Post-trial review under the California procedure is in the trial judge's "independent judgment", a stricter standard than approved in *Haslip*. This case is distinguishable from *Haslip* only in its more stringent safeguards for assessment of punitive damages.

Motors, 66 Cal. App. 3d 481, 501-502 (1976); but see *Pacific Mut. Life Ins. Co. v. Haslip* (Ala. 1989) 553 So. 2d 537, 543, Cert. granted April 2, 1990, 1990 U.S.L.W. 15078, No. 89-1279).

The petition should be denied at once.

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[6] MGW, Inc. has no parent companies or subsidiaries.

(5)

No. 90-626

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

PACIFIC LIGHTING CORPORATION,
FREDRICKS DEVELOPMENT CORPORATION, and
DUNN PROPERTIES CORPORATION,

Petitioners,

v.

MWG, INC.,

Respondent.

SUPPLEMENTAL BRIEF FOR PETITIONERS

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SUPPLEMENTAL BRIEF FOR PETITIONERS

This supplemental brief is submitted pursuant to Rule 15.7 of the Rules of this Court to address the Court's decision in *Pacific Mutual Life Insurance Co.* v. *Haslip*, No. 89-1279 (Mar. 4, 1991).[1]

In *Pacific Mutual*, the Court held that Alabama's elaborate post-verdict procedure for reviewing punitive damage awards and the "detailed substantive standards," slip op., at 17, applied by the Alabama courts thereunder "impose[ ] a sufficiently definite and meaningful constraint on the discretion of Alabama fact finders in awarding punitive damages" for purposes of the Due Process Clause of the Fourteenth Amendment. *Id.*, at 18. Because the California system that produced the $2,000,000 punitive damage award in this case wholly lacks such constraints, it is facially invalid under the Due Process Clause as interpreted in *Pacific Mutual*.

As demonstrated in the petition, at 9-11, California juries are entrusted with extremely broad discretion to inflict punitive damages. In California, "[t]he channeling of just the correct quantum of bile to reach the correct level of punitive damages is, to put it mildly, an unscientific process . . . complicated by the lack of objective criteria from either the Legislature or the courts as to 'how much' is necessary to punish and deter." *Devlin* v. *Kearny Mesa AMC/Jeep/Renault, Inc.*, 155 Cal. App. 3d 381, 388, 202 Cal. Rptr. 204 (1984). As respondent itself points out, Supp. Br. in Opp., at 1-2 n.1, California juries are expressly instructed, as was the jury in this case, that "[t]he law provides no fixed standards as to the amount of . . . punitive damages, but leaves the amount to the jury's sound discretion. . . . ." Moreover, unlike the Alabama scheme at issue in *Pacific Mutual*, which precludes the jury from considering the defendant's wealth when calculating punitive damages,[2] the California system

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[1] This brief also responds to the Motion to Vacate Stay of Execution and Supplemental Brief filed by respondent on March 7, 1991.

[2] *See Pacific Mutual*, slip op., at 16.

requires and encourages the jury to do so,[3] and plaintiffs often do "enjoy a windfall because they have the good fortune to have a defendant with a deep pocket." *Pacific Mutual*, slip op., at 19. Thus, the discretion of California juries to determine the amount of punitive damages to inflict in a particular case is at least as broad, if not broader, and more constitutionally suspect than the punitive discretion of Alabama juries.

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[3] The California standard "approved" punitive damage jury instruction, which was given in this case, requires the jury to consider the "defendant's financial condition." *See California Jury Instructions (BAJI)* 14.71, at 205 (7th ed. 1986); *see* Supp. Br. in Opp., at 1-2 n.1.

Respondent points out that, as in Alabama, *see Pacific Mutual*, slip op., at 3 n.1, juries in California are instructed to impose punitive damages to achieve the goals of retribution and deterrence, Supp. Br. in Opp. at 3, but these concepts are not explained in an understandable fashion to the jury. The standard instruction provides "no information to the jury about criminal fines for comparable conduct or the range of punitive damages awards in similar cases. Nor [does] it identify the limitations dictated by retributive and deterrent principles, or advise the jury to refrain from awarding more than necessary to meet those objectives." *Pacific Mutual*, slip op., at 7 (O'Connor, J., dissenting). Rather, the jury is vaguely told to consider the "reprehensibility" of the defendant's conduct and the defendant's wealth when calculating the punitive damage award. *See* Supp. Br. in Opp. at 1-2 n.1. "Guidance like this is scarcely better than no guidance at all," *Browning-Ferris Industries of Vermont, Inc.* v. *Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2923 (1989) (Brennan, J., concurring), and, in fact, is mere "platitude." *Pacific Mutual*, slip op., at 14 (Scalia, J., concurring in the judgment). Consequently, although the instruction tells the jury that the punitive award must bear a "reasonable relationship" to compensatory damages, Supp. Br. in Opp., at 3, the California courts have repeatedly recognized that that relationship is an inherently meaningless constraint on the discretion of judges and juries to impose punishment in that State. *See, e.g., Gagnon* v. *Continental Casualty Co.*, 211 Cal. App. 3d 1598, 1604, 260 Cal. Rptr. 305 (1989) (observing that the relationship between compensatory and punitive damages has "little inherent meaning" and that a ratio of "2,000 to 1 [has] been found to be reasonable"); *Downey Savings & Loan Association* v. *The Ohio Casualty Insurance Co.*, 189 Cal. App. 3d 1072, 1099, 234 Cal. Rptr. 835 (1987) (because the jury is entitled to punish a defendant for its antisocial conduct generally, not just for conduct directed at the plaintiff, the ratio between compensatory and punitive damages carries "little weight"), *cert. denied*, 486 U.S. 1036 (1988).

The Court's conclusion in *Pacific Mutual* that the Alabama punitive damage system did not violate the Due Process Clause was predicated in substantial part upon that State's unique and rigorous post-verdict review procedure for "scrutinizing punitive awards." Slip op., at 17. That procedure first requires the trial court to "conduct[] a post-verdict hearing," *id.*, at 19, and to articulate specifically its reasons for setting aside a punitive damage award or refusing to do so. *See id.* The Supreme Court of Alabama has developed a number of "objective criteria," *id.*, at 20, and "detailed substantive standards," *id.*, at 17, to be applied by the trial court during post-verdict review, which this Court in *Pacific Mutual* summarized as follows:

> (a) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred; (b) the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; (d) the "financial position" of the defendant; (e) all the costs of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and (g) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation.

Pacific Mutual, slip op., at 18. On appeal, the Supreme Court of Alabama itself evaluates the punitive damage award under these same standards and compares the punishment to punitive awards in similar cases, thereby "provid[ing] an additional check on the jury's or trial court's discretion." *Id.*, at 17.

Post-verdict review procedures in California contrast sharply with the Alabama system. As respondent candidly acknowledges, the trial court does not perform an objective

review of the jury's punitive damage verdict, but rather "[s]it[s] as a thirteenth juror," Supp. Br. in Opp. at 3, who, in the complete absence of the kind of substantive standards applied by Alabama trial courts, is entitled to exercise its own broad and subjective discretion to punish. California trial courts need not, and generally do not even attempt to, explain their rationale for upholding massive punitive fines.

On appeal, "[a]ll presumptions favor the correctness of the verdict and judgment," *Devlin*, 155 Cal. App. 3d, at 388, and the trial court's determination that a punitive damage award is not excessive is "accorded great weight." *Id.*; *see also Bertero* v. *National General Corp*, 13 Cal. 3d 43, 64, 529 P.2d 608, 118 Cal. Rptr. 184 (1974). "An award of punitive damages will be reversed as excessive only when the entire record viewed most favorably to the judgment indicates the award was the result of passion and prejudice." *Downey*, 189 Cal. App. 3d, at 1099; *see, e.g.*, *Walker* v. *Signal Companies, Inc.*, 84 Cal. App. 3d 982, 997, 149 Cal. Rptr. 119 (1978) ("To reverse, an appellate court must ' ". . . conclude that recovery is so grossly disproportionate as to raise a presumption that it is the result of passion and prejudice." ' ") (citation omitted). In *Pacific Mutual*, this Court strongly suggested that such standardless and highly deferential appellate review of punitive damage verdicts will not survive scrutiny under the Due Process Clause. Slip op., at 17 n.10.[4]

The California Courts of Appeal in recent years have generally deferred to the "wide discretion," *Downey*, 189 Cal. App. 3d, at 1097, of juries to impose punitive damages and have routinely affirmed seven- and eight-digit punitive verdicts, often in "unpublished" or "depublished" opinions

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[4] Unlike the Alabama Supreme Court, which reviews punitive damage awards pursuant to numerous objective and detailed substantive criteria, California appellate courts emphasize that "determining the proper amount of punitive damages" is an intensely subjective and " 'fluid process,' " *see Devlin*, 155 Cal. App. 3d, at 390-91, and therefore focus only upon the same three general factors considered by the jury, *see supra* note 3, when determining whether an award is excessive. *See, e.g.*, *Downey*, 189 Cal. App. 3d, at 1097-1100.

that shield their analysis from public scrutiny. *See* Pet., at 18 & n.11. At the same time, the Supreme Court of California has consistently refused to exercise discretionary review to scrutinize punitive damage awards on any basis, constitutional or otherwise, and, indeed, has not examined a punitive damage award for excessiveness since its 1979 decision in *Egan* v. *Mutual of Omaha Insurance Co.*, 24 Cal. 3d 809, 598 P.2d 452, 157 Cal. Rptr. 452 (1979). Thus, that court has completely abdicated any responsibility for ensuring some principle of reasonable uniformity in the punitive damage verdicts coming out of the California intermediate appellate courts.

The Court of Appeal in this case concluded that the California punitive damage system is facially "constitutional under ... the due process provision of the Fourteenth Amendment." Pet. App. A, 12a. This Court's decision in *Pacific Mutual* casts serious doubt on that conclusion. Accordingly, this petition should be granted and the case either set for plenary consideration or vacated and remanded to the California Court of Appeal for reconsideration in light of *Pacific Mutual*.

March 11, 1991

Respectfully submitted,

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